Petition

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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MCDONNELL DOUGLAS CORPORATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

ROBERT H. MOURNING,

Intervenor.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Were the Ninth Circuit and the National Labor Relations Board correct in holding that an employee who exercises supervisory authority is not a "supervisor" under the National Labor Relations Act, as amended, because he only supervises, directly or indirectly, other supervisory employees?

2. If such employee would otherwise be excluded from the coverage of the Act as a supervisor is the frequency with which he exercises his supervising authority determinative of his status or is his status determined by the existence of his supervisory authority?

3. May a reviewing court enforce an NLRB decision on the basis that the Board's decision is supported by substantial evidence in the record as a whole when the Board did not purport to base its decision upon the record as a whole or to resolve the sharp conflicts in the evidence as to the employer's motivation but instead purported to decide the matter based upon inferences from the uncontradicted evidence without resolving the credibility of the direct evidence of lawful motivation?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 655 F.2d 932 (1981) and appears in the Appendix at A1. The initial decision of the National Labor Relations Board (including the decision of its Administrative Law Judge) is reported at 221 NLRB 1180 (1975) and appears in the Appendix at A2. The Supplemental Decision and Order of the National Labor Relations Board is reported at 238 NLRB 668 (1978) and appears in the Appendix at A3.

[1] In addition to the parties reflected by the caption, the following information is provided pursuant to the Rules 21.1(b) and 28.1. The Petitioner's non wholly owned subsidiaries and affiliates are: Coaliquid, Inc., American Monitor Corporation and Nitron, Inc. Intervenor Mourning has been represented by counsel who is an employee of the Air Line Pilots Association.

JURISDICTION

The decision of the Court of Appeals for the Ninth Circuit was entered in this proceeding on March 12, 1981. A timely petition for hearing was denied and the suggestion for rehearing *en banc,* rejected on November 12, 1981. This petition is filed within 90 days of that denial.

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 2 of the Labor Management Relations Act, 29 U.S.C. § 152, the National Labor Relations Act, as amended, provides in pertinent part as follows:

"When used in this subchapter—

"(3) The term 'employee' shall include any employee, . . . but shall not include . . . any individual employed as a supervisor . . . .

"(11) the term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

STATEMENT OF THE CASE

On November 15, 1968, pilot Robert Mourning was discharged by Douglas Aircraft Company Director of Flight Operations A. G. Heimerdinger for unsafe flying practices (Tr. 375-76, 405-06).[2] More than five months later, contending that he had been terminated because of union activities,

[2] References to the transcript of the hearing before the Administrative Law Judge (the "ALJ") are designated as "Tr. ....."

Robert Mourning filed a charge with the National Labor Relations Board ("NLRB" or "Board"). R.I.1.[3] The charges were dismissed by the Regional Director and Mourning's appeal was denied by the General Counsel of the NLRB in September 1969. R.I.4, p. 8. A letter from Mourning threatening criminal indictments against the NLRB officials involved in dismissing his charge was treated as a motion for reconsideration and denied. R.I.4, pp. 9-10. In March of 1970, a second motion for reconsideration was denied by the General Counsel. R.I.4, p. 11-12. In 1972, almost 4 years after Mourning's discharge, the General Counsel, pursuant to a further request, reversed his earlier decisions and ordered that a complaint be issued. R.I.4, p. 13. Upon an interlocutory appeal, the Board held in accordance with its decision in *Forest Industries Inc.*, 168 NLRB 732 (1967), that the General Counsel did not have the authority to issue a complaint under such circumstances and ordered the complaint dismissed. 202 NLRB 305 (1973). An appeal by Mourning to the District of Columbia Court of Appeals resulted in a reversal of the Board's dismissal and a remand to permit the General Counsel to refile the complaint on behalf of Mourning. *Mourning v. NLRB,* 505 F.2d 421 (D.C. Cir. 1974).

In 1975, over six year's after Mourning's termination for unsafe flying practices, a three-day hearing was held before Administrative Law Judge Richard J. Boyce with regard to allegations that Mourning's discharge violated sections 8 (a) (1) and (3) of the National Labor Relations Act and that a conversation shortly after Mourning's discharge between Supervisor Quinn and another transport pilot, Malcolm Campbell, violated section 8 (a) (1) of the Act. Upon considering the matter, the ALJ found that both Mourning and Campbell were supervisors because of their authority responsibly to direct others:

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[3] References to the record filed by the Board with the Ninth Circuit are designated as "R[ecord] I[tem] ....." utilizing the Item numbers from the index supplied by the Board. Since pages are not numbered consecutively in the record, specific pages within Items will be identified as "R.I., p. ....." counting pages from the beginning of the Item.

"Mourning, as pilot in command, and all other of Respondent's pilots in that role, had ultimate nondelegable responsibility for the success of the mission. This included responsiblity for the safety of passengers and crew, if any, and for the preservation of the equipment. *Thus, the pilot in command had authority to direct the copilot in the way he performed his duties, overriding the copilot's judgment and actions if necessary.* Similarly, if conduct of others aboard created a safety hazard or otherwise imperiled the success of a mission, the pilot in command was empowered to take appropriate action.

"In short, the pilot in command—Mourning included, when he served in that role—was the unquestioned captain of the ship, with all of the responsibilities and prerogatives that that implies." A2-p.4-5, 221 NLRB at 1181, emphasis added.

Having found both Mourning and Campbell to be supervisors, the ALJ found it "unnecessary" to make the credibility determinations which would otherwise be needed "to reach a judgment concerning [the discharge's] underlying motivation" or to determine if the comments attributed to Quinn "in fact were made." A2-p.6-7, 221 NLRB at 1181.

The National Labor Relations Board adopted in its entirety the ALJ's recommendations and again dismissed the complaint. *Douglas Aircraft Company, a component of McDonnell Douglas Corp.*, A2-p.1, 221 NLRB 1180 (1975).

The charging party again petitioned the District of Columbia Court of Appeals. Although that court did not reach the merits of the charging party's supervisory status, it did remand the case to the Board for consideration of two issues raised *for the first time* by the charging party on appeal, *Mourning v. NLRB*, 559 F.2d 768 (D.C. Cir. 1977) (per curiam, Judge MacKinnon, dissenting). The two issues were: (1) whether as a matter of law an individual can be classified as a supervisor if the individual exercises supervisory authority only over other

supervisors and (2) the factual issues of whether Mourning ever exercised authority over persons other than his copilot, and, if so, whether the authority he exercised over such persons was too sporadic and routine to justify classifying him as a supervisor. *Ibid,* at 771.

On remand, the Board reversed its earlier holding and now found that Mourning was not a supervisor. Without making any new findings of fact, the Board found that the supervisory authority Mourning exercised over his copilot was too sporadic and routine to justify classifying him as a supervisor and that an employee may not be classified as a supervisor if he exercises supervisory authority only over other supervisors. A3-p.8-9, 238 NLRB at 670-71. Then, instead of remanding the matter to the ALJ for findings of fact and credibility determinations as had been urged by General Counsel, the Board purported to resolve the issues based on the "uncontradicted testimony in the record," A3-p.9, n.20, 238 NLRB at 671, n.20. Without making any credibility findings or discrediting the direct testimony that Mourning was terminated because of his unsafe flying, the Board held based on its inferences from the "uncontradicted testimony" that the Douglas Aircraft Company had been motivated by Mourning's alleged union activities and had seized upon his poor flying record solely as a pretext. A3-p.13, 238 NLRB at 672.

Petitioner sought review by the Ninth Circuit Court of Appeals, the Circuit in which the Douglas Aircraft Company is located. The Ninth Circuit transferred the matter to the District of Columbia Circuit which, in turn, retransferred the matter to the Ninth Circuit on the ground that Mourning's original appeal to the D.C. Circuit had become moot since he prevailed on remand to the Board. The Ninth Circuit then affirmed the Board and denied a rehearing. Petitioner now seeks certiorari.

REASONS FOR GRANTING THE WRIT

A. REVIEW OF THIS CASE IS REQUIRED BECAUSE THE NINTH CIRCUIT'S HOLDING THAT PILOT MOURNING WAS NOT A SUPERVISOR BECAUSE HE ONLY SUPERVISED OTHERS WITH SUPERVISORY AUTHORITY DECIDES AN IMPORTANT ISSUE OF LAW IN CONFLICT WITH DECISIONS IN OTHER CIRCUITS AND DECISIONS OF THIS COURT.

Within the last two years, this Court has twice found it necessary to review decisions concerning the proper division under the National Labor Relations Act, as amended, between employees with bargaining rights pursuant to the Act and management and supervisory employees who are excluded from the Act's coverage.[4] This dichotomy is central to the structure of the Nation's labor laws and the organization of its industrial enterprises and this Court has not hesitated to act when necessary to insure a proper delineation.

The instant matter similarly requires this Court's review because the NLRB not only acted prior to, and thus without the benefit of, this Court's decision in *NLRB v. Yeshiva University,* 444 U.S. 672, 100 S.Ct. 856 (1980), but also in conflict with it. Indeed, in reversing itself and holding for the first time in its history that an employee may not be classified as supervisor unless he exercises his supervisory authority directly or indirectly over non-supervisory employees, A1-8, n.1, 655 F.2d at 936, n.1, the Board and the Ninth Circuit rendered decisions which are inconsistent with the purpose of the supervisory exemption to the National Labor Relations Act and contrary to

[4] In *NLRB v. Yeshiva University,* 444 U.S. 672, 100 S.Ct. 856 (1980), this Court found an entire faculty could be excluded from the Act as management employees. In *NLRB v. Hendricks County Rural Electric Membership Corp.,* ..... U.S. ....., 50 U.S. Law Week 4057 (December 2, 1981), this Court held that employees with access to confidential management information such as confidential secretaries were not excluded from the Act in the absence of a labor relations nexus.

its legislative history as well as in conflict with this Court's decision in *Yeshiva* which recognized that an *entire* faculty could be exempt from the Act as managerial employees even though this might result in a university with no non-supervisory employees to manage. To reach this result the Board and the Court of Appeals relied upon a circular and literal interpretation of the Act which had been expressly rejected by this Court as early as 1941 in its decision in *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 191, 61 S.Ct. 845 (1941).

Equally in need of review is the alternative holding of the Board and the Ninth Circuit that Mourning could not in any event be a supervisor because he exercised supervisory authority only 5% of the time. This conclusion is not only in conflict with the undisputed evidence but also in conflict with decisions in the First, Sixth and D.C. Circuits[5] which have recognized that it is the existence of supervisory authority and not the frequency of its exercise which is determinative of supervisory status, a conclusion also compelled by this Court's decision in *Yeshiva.* 444 U.S. 672, 100 S.Ct. at 863 n.17.

B. REVIEW OF THIS CASE IS ALSO REQUIRED BECAUSE THE NINTH CIRCUIT DEPARTED FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS BY ENFORCING AN NLRB ORDER WHICH WAS PURPORTEDLY BASED ON "UNCONTRADICTED TESTIMONY" WHERE THE RECORD REVEALS UNAVOIDABLE CONTRADICTIONS REGARDING THE CRUCIAL ISSUE OF MOTIVATION WHICH COULD ONLY BE RESOLVED THROUGH CREDIBILITY RESOLUTIONS WHICH HAVE NEVER BEEN MADE.

The decisions of the Board and the Ninth Circuit also involve a fundamental error requiring this Court's exercise of its supervisory authority in order to insure that an unsafe pilot is

[5] The decisions in these Circuits are discussed *infra* at pp. 20-21.

not thrust into the command of a DC-9 or DC-10[6] without any finder of fact ever having made the credibility resolutions necessary to determine whether Mourning was terminated because of his unsafe flying. The ALJ who had the opportunity to observe the witnesses did not make credibility findings concerning Heimerdinger's motivation in terminating Mourning because such findings were unnecessary in light of his concluding that Mourning was a supervisor and thus not entitled to the protections of the Act. And the Board did not make its own credibility findings, purporting instead to resolve the issues concerning Mourning's termination "based on uncontradicted testimony in the record." A3-p.9 n.20, 238 NLRB at 671 n.20.

But on the crucial issue of motivation Heimerdinger's testimony was directly contrary to the circumstantial evidence on which the Board relied. Consequently, as recognized at one time by the Board's own General Counsel, R.I.26, p. 6, this matter cannot be resolved on the uncontradicted evidence without credibility determinations having been made no matter how anxious the Board may have been to dispose of this matter due to its long and tortured history.

Nor was the Ninth Circuit correct in finding that the Board's decision could be enforced because it was supported by substantial evidence in the record as a whole for the Board did not purport to base its decision upon the record as a whole, but only upon the "uncontradicted testimony." Under such circumstances the most basic principles of appellate review with regard to administrative agencies require that reviewing courts "must judge the propriety of such action solely on the grounds invoked by the agency." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

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[6] The small plane business fleet in which Mourning flew when he was employed at Douglas has long since been eliminated (Tr. 235) and a dispute has now arisen between the parties as to whether, as Douglas contends, Mourning would have been laid off in any event in 1970 and hence not be eligible to return under the Board's order or whether, as Mourning contends, he would have been transferred to flying DC-9's and DC-10's had he not been terminated and hence must be so employed today.

In short, because the Board and the Ninth Circuit have misconceived the supervisory exemption and rendered a decision inconsistent with this Court's decision with *Yeshiva*, petitioner urges that certiorari should be granted, and, that as a minimum, the case be remanded for reconsideration in light of *Yeshiva* and *Hendricks County*. Review is also necessary because of the conflict in the Circuits with regard to the frequency with which supervisory authority must be exercised. Additionally, because of the failure of the Board to make credibility resolutions and the failure of the Ninth Circuit to require that they be made, Petitioner urges that certiorari be granted and a full hearing held, or alternatively, that this matter be summarily reversed and remanded with instructions that such findings be made by the Board and its Administration Law Judge.

ARGUMENT

1. Respondent Mourning was a supervisor within the meaning of Section 2(11) even if he supervised directly or indirectly only other supervisory employees.

As pointed out by the Ninth Circuit, if the phrase "other employees" in Section 2(11) of the Act which defines supervisors is "given its everyday meaning, i.e., other persons who work for the employer," this

> "definition would include the copilots who flew with Mourning when he was pilot in command. *That would make Mourning a supervisor,* since to some extent he directed his copilots when he was pilot in command." A1-p. 7, *McDonnell Douglas Corp. v. NLRB,* 655 F.2d 932, 935; emphasis added.

However, by a totally circular reading of Sections 2(3) and 2(11), the Court concluded that Mourning was not a supervisor within the meaning of Section 2(11). Thus Section 2(11) provides as follows:

> "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward,

> or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requures the use of independent judgment." 29 U.S.C. § 152(11).

As recognized by the Ninth Circuit, the determinative phrase is "other employees." To define this phrase the Ninth Circuit went to the definition of 'employees' found in Section 2(3) which provides as follows:

> "The term 'employee' shall include any employee . . . but shall not include . . . any individual employed as a supervisor. . . ." 29 U.S.C. § 152 (3).

The Ninth Circuit then concluded that if Mourning was a supervisor so must his copilots be supervisors for the Court found that Mourning and his fellow pilots served interchangeably as pilots in command and copilots.[7] A1-p. 7-8, 655 F.2d at 936. The Ninth Circuit then continued:

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[7] This finding, which is crucial to the rationale of the Ninth Circuit, is inconsistent with the *undisputed* evidence in the record which established that the co-pilot of the Jet Commander being flown by Mourning 30% of the time at the time of his termination was *not* always a pilot qualified to serve interchangeably as the pilot in command. Tr. 62-63. In light of the serious consequences here which could involve Petitioner's being forced to place in the air an unsafe pilot, this error alone requires this Court's review (and reversal) in the exercise of its supervisory authority.

The Board and the Ninth Circuit also erred in finding that Mourning only supervised copilots. The ALJ, based upon a specific credibility resolution, found that transport pilots such as Mourning flew some flights with a crew consisting of "a copilot, a mechanic, and an engineer." A2-p.4, 221 NLRB at 1181. Although the ALJ found specific evidence lacking that Mourning had ever had such a crew, the lack of such specific evidence is legally irrelevant here for two reasons: (1) It is the existence of supervisory authority in the position which is determinative and not its exercise. See discussion at pp. 20-21 infra. (2) The General Counsel has the burden of proving Mourning an employee, *Cf. Texas Department of Community Affairs v. Burdine,* _____U.S. _____, 101 S.Ct. 1089 (1981), and therefore the absence of evidence concerning the specific members of Mourning's crew is fatal to the General Counsel's case since the ALJ specifically found that the transport pilots *in general* did do some of their flying with such crews.

> "If they are all supervisors, they cannot be 'employees' by reason of § 2(3). That would mean that the pilots would be supervisors with no employees to supervise. Yet § 2(11) defines 'supervisor' as one who exercises authority over 'employees.' Defining the pilots as 'supervisors' therefore becomes a logical impossibility under the Act. The escape from this logical dilemma is to hold, as the Board did, that in their relation to each other, the pilots are employees and not supervisors." *id.*

The Ninth Circuit went on to conclude, as a matter of policy, that the definition of employee should be interpreted broadly and that of a supervisor narrowly "for a worker who is deemed to be a supervisor loses his organizational rights." A1-p. 9, 655 F.2d at 936.

The statutory argument of the Ninth Circuit is pure sophistry, however, since the interrelationship of Section 2(3) and Section 2(11) on its stated facts is circular at whatever point the analysis begins. Indeed, the "logical impossibility" noted by the court works equally well in reverse. That is, if Mourning and his copilots are all employees within the meaning of Section 2(3), as found by the Circuit, then under Section 2(11) Mourning becomes a supervisor since he supervised his copilot who has been found to be an employee. At this point, we return to where the Ninth Circuit began its trip around the circle.

With such a paradox, it is obvious that a technical reading of Sections 2(3) and Sections 2(11) must be abandoned in favor of a more fundamental analysis of the purpose of the Act and of the types of exclusions from coverage intended by Congress. Indeed, this Court has previously rejected precisely the type of analysis undertaken by the Board and the Ninth Circuit, emphatically concluding with regard to an analysis that "derives wholly from an infiltration of a portion of § 2(3) into § 10(c):"

> "The syllogism is perfect, but this is a bit of verbal logic from which the meaning of things has evaporated." *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 191, 61 S.Ct. 845, 851 (1941).

Thus instead of the type of analysis undertaken here by the Ninth Circuit, this Court mandated that analysis be undertaken with reference to the purpose and legislative history of the Act. 313 U.S. at 190. Especially has this been this Court's mandate with regard to managerial and supervisory employees since the Congress enacted the Taft-Hartley Amendments to the Wagner Act in 1947.

Prior to 1947, the only exclusions from Section 2(3) were for agricultural laborers, domestics, and individuals employed by parents or spouses. As a result the NLRB had great difficulty in attempting to determine the status of supervisors. At first it excluded supervisors from bargaining units of rank and file employees, *Mueller Brass Co.,* 39 NLRB 167 (1942), but then certified supervisors in a separate unit represented by an independent union, *Union Collieries Coal Co.,* 41 NLRB 961, 44 NLRB 165 (1942). Yet in the same year the Board also permitted a bargaining unit of supervisors where the supervisors' union was affiliated with rank and file employees. *Godchaux Sugars, Inc.* 44 NLRB 874 (1942). Then in *Maryland Drydock,* 49 NLRB 733 (1943), the Board held that superisors were not covered by the Act. In so holding, the Board was influenced by the fact that Section 2(3), read literally, would permit all employees, executives, and officers of the company other than the Board of Directors to be organized in collective bargaining units.

Just a few years later, the Board again reversed itself permitting the organizing of foremen into a bargaining unit. When this Court upheld that action of the Board in *Packard Motor Car Co. v. NLRB,* 330 U.S. 485, 67 S.Ct. 789 (1947), the Congress intervened providing as part of the Taft-Hartley Act a

definition for supervisors in Section 2(11) and an exclusion for supervisors by amending Section 2(3).

Although supervisors are the only management employees specified in Sections 2(3) and 2(11), it was readily apparent that supervisors were only the first step of management, and that the exclusions of the Taft-Hartley Act were not complete, for if read technically, Section 2(3) would not exclude from the Act managerial employees above supervisors, up to and including the chief executive officers. The issues thus created were finally resolved in *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 94 S.Ct. 1757 (1974), where this Court held that all managerial employees were excluded from coverage even though no mention of such employees is made in Section 2(3). In so holding this Court rejected the NLRB's contention that only those managerial employees who were involved in labor relations were excluded from coverage.

From even this brief analysis, it is apparent that there is no basis in the Act or its history for concluding that a dogmatic technical reading of definitional sections should be used as a basis for including employees who Congress clearly intended to exclude. Indeed, rejection of the Ninth Circuit's statutory sophistry is dictated by both normal canons of construction and by legislative history. As noted by Judge MacKinnon when the issue was considered but not decided by a panel of the D.C. Circuit, there is a perfectly adequate basis in statutory construction to avoid the circular trap in which the Ninth Circuit found itself. One need only interpret the term "other employees" in Section 2(11) in accord with everyday usage to mean any other employee of the company. 559 F.2d at 773. Such constructions which lead to meaningful interpretations are, of course, favored over those which render language ineffective. *FTC v. Manager Retail Credit Co.*, 15 F.2d 988, 994 (1975).

More significantly, however, the construction urged by Petitioner—and intially applied by the Board in this matter—is favored by the legislative history of the Taft-Hartley Act. As

pointed out in this Court's recent opinion of *NLRB v. Hendricks County Rural Electric Membership Corp.*..... U.S. ....., 50 U.S. Law Week 4037 (December 2, 1981), the House version of the definition of supervisor defined the persons supervised as "any individuals employed by the employer." *Id.* at 4040 n.13, whereas the Senate version used the phrase "other employee" to accomplish the same purposes. Because the House bill also included three other categories of employees, such as time-study employees, the Senate version was accepted over the House version in conference. However, Senator Taft's commentary on the changes made in Conference demonstrates that the phrases "any individuals employed by the employer" and "other employees" were regarded as equivalents since his description of the three basic issues that were compromised not only omits any mention of this issue, *id.* at 4040 n.15, but affirmatively states that both the House bill and Senate amendments were in agreement in intending to exclude "supervisors from the individuals deemed to be employees for the purposes of the act." 93 Cong. Rec. 6599 (1947). Similarly the House Conference Report emphasized that "both the House bill and the Senate amendment excluded supervisors from the individuals who are to be considered employees for the purposes of the act" before pointing out the three basic issues on which the House receded. House Conf. Rept. No. 510, on H.R. 3020, 80th Cong., 1st Session (1947), *reprinted in* I NLRB Legislative History of the Labor Management Relations Act, 1947, at 539.

That the phrases "any individuals employed by the employer" as used by the House and "other employees" as used by the Senate were intended as equivalents is also demonstrated by this Court's decision in *NLRB v. Bell Aerospace Co., supra.* Thus in analysing the legislative history of the Taft-Hartley Act, this Court quoted in full the original House definition of supervisor including the phrase "any individual employed by the employee" and then noted that the House had intended to exclude as "supervisors" "a category broadly defined to include any individual who had authority to hire, . . .

reward, or discipline *other employees* or effectively to recommend such action." 446 U.S. at 279-80 at 279 n.9, emphasis added. This analysis in *Bell* further undermines the circular, literal interpretation of the Ninth Circuit and accurately reflects the Congressional intent that the phrase "other employees" be given its everyday meaning as referring to other individuals employed by the employer. As so interpreted, the Ninth Circuit has conceded that Mourning is a supervisor, A1-p. 7, 655 F.2d at 935.

One additional observation by this Court in *NLRB v. Bell Aerospeace Co.* is also directly relevant here for this Court there noted:

> "[O]ther legislation indicated that where Congress desired to include managerial or supervisory personnel in the category of employees, it did so expressly. See, e.g., Railway Labor Act of 1926, 44 Stat. 577, 45 U.S.C. § 151; Merchant Marine Act, 1936, as amended, 52 Stat. 953, 46 U.S.C. § 1101 et seq.; Social Security Act, § 1101, 49 Stat. 647." 416 U.S. at 279, 94 S.Ct. at 1764.

Here, of course, there is no indication that Congress intended its definition of "employee" to include any employees with supervisory responsibility. Indeed, just the opposite is true. Congress clearly intended to exclude from the Act's coverage all supervisors without qualification, even those who supervised others. Indeed, this too was noted by this Court in *Bell* where this Court commented upon the concern of the Congress that unless the Wagner Act were amended "even vice presidents might be unionized." 416 U.S. at 281, 94 S.Ct. at 1765, citing S.Rep. No. 105, 80th Cong., 1st Sess., 4 (1947), reprinted in I NLRB Legislative History of the Labor Management Relations Act, 1947, p. 410.

The Ninth Circuit further erred in attempting to provide a policy justification for its improper statutory construction. Not only is policy making in this area the province in the first instance of the NLRB, *NLRB v. Enterprise Association,* 429

U.S. 507, 522 and 522 n. 9, 97 S.Ct. 891, 900 and 900 n. 9 (1977), but also the policy considerations relied upon by the Ninth Circuit are in direct conflict with this Court's recent decision in *Yeshiva*. Thus the Ninth Circuit was concerned that interpreting the Act as urged by Petitioner would leave some persons unprotected by the Act noting that the Board as a matter of policy should "not construe supervisory status too broadly, for a worker who is deemed to be a supervisor loses his organizational rights." A1–p. 9, 655 F.2d at 936. The Ninth Circuit then postulated that the only "purpose of excluding supervisors from the protection granted by the Act to employees is that the status of the two groups in relation to each other is fundamentally inconsistent" while in this case the court found that "no such representational conflict occurs when one pilot deals with another pilot whose relationship to management is exactly the same as his own." *Id.* The Ninth Circuit found these factors persuasive to support its holding that "to qualify as a supervisor, it is . . . necessary that a person supervise statutory 'employees' directly or indirectly through a chain of command." A1–p. 8 n. 1, 655 F.2d at 936 n. 1.

But both this holding and the policy reasons cited in its support conflict with this Court's decision and analysis in *Yeshiva*. Thus this Court found that an entire faculty could be exempt from the Act's coverage as managerial employees even though there were *no* non-supervisory, non-managerial, Section 2(3) employees to manage. And this Court found its policy bearings not in a desire to insure the Act the broadest coverage or simply to avoid "representational conflicts." Rather this Court correctly noted that the Congress had been primarily concerned with the conflict between loyalty to management and a conflicting loyalty to a union and that, accordingly, the Act must be interpreted:

> "To ensure that employees who exercise discretionary authority on behalf of the employer will not divide their loyalty between employer and union." 444 U.S. 672, 100 S.Ct. at 865.

This conflict could be and was, found to exist even where there were no Section 2(3) employees to be managed or supervised directly or indirectly.

In reaching its decision here, the Ninth Circuit also ignored an age old body of law on the actual and common law rights of a ship's captain, whether it be ocean going or airborne, which establish the management interest and supervisory role at issue. As stated in one of a trilogy of NLRB cases relied on by the ALJ, *Lockheed—California Co.,* 207 NLRB 686 (1973):

> "The direction which a plane pilot exercises with respect to crewmen and other personnel aboard a plane is at least comparable to the authority which a ship's captain or pilot exercises as to ship's crew personnel. In a number of cases, the Board has found that ships' captains and pilots responsibly direct ships' crews and on this ground alone has found the captains and pilots to be supervisors." *Id.* at 687.

Similarly in the case at bar, when the pilots here "supervise" they are expressing a management interest on behalf of their employer which is inconsistent with union organizing. This conflict is inherent, even if these pilots only supervise other supervisors.

When the proper standards are applied it is readily apparent that the Ninth Circuit's hyper-technical circularity must be abandoned and Mourning once again recognized as a supervisor. Indeed, as the Ninth Circuit itself noted at the outset of its decision, an everyday reading of the language of the statue "would make Mourning a supervisor, since to some extent he directed his copilots when he was pilot in command." A1-p. 7, 655 F.2d at 935.

Accordingly, Petitioner urges this Court to grant certiorari and to cause the decision of the Board in this matter to be set aside, or alternatively, to cause this matter to be remanded to

the Board for reconsideration in light of *Yeshiva* and *Hendricks County* neither of which, of course, existed at the time the Board reversed itself in this matter and abandoned its initial holding that Mourning was a supervisor.

2. Mourning's supervisory activities were not so sporadic as to cause him to lose his supervisory status and to render Section 2(11) inapplicable.

Neither the record in this matter, nor the remand of the District of Columbia Circuit which framed the issues open for review, permit the argument that Mourning's supervision over his copilots was so sporadic as to render Section 2(11) inoperable. Indeed, the remand of the D.C. Circuit was quite specific remanding only for purpose of considering the issue of statutory construction discussed above and "for clarification" of two specific factual questions:

> "(1) whether petitioner's crew ever consisted of persons who were 'employees' within Section 2(3) or were merely other pilots like himself, and (2) if so, whether the authority he exercised over these [i.e., the Section 2(3)] employees was not 'too sporadic and routine' to warrant classifying him as a supervisor." 559 F.2d at 771; emphasis added.

Thus the remand on this issue was solely—assuming Mourning was not a supervisor by virtue of supervising his copilot--to determine whether non-copilot crew members along on Mourning's flights were sufficient to satisfy the "other employee" standard of Section 2(11).

The Board ignored the limits of the mandate and the record before it to render an alternative finding that Mourning's supervision of copilots was "too sporadic" to make him a supervisor. This was then adopted by the Ninth Circuit because Mourning allegedly flew with a copilot only 5% of his overall flight time. A1-p.10, 655 F.2d at 937. This conclusion, however, is factually irrelevant and legally improper. It is

factually irrelevant because it focuses upon Mourning's "overall" record[8] when the undisputed facts established that during his last three months' employment—the period legally relevant for determing his status at the time of discharge—he spent approximately 30% of his time as pilot in command of the Jet Commander with a copilot. And it is legally improper because it is the existence of supervisory authority and not the frequency of its exercise which is determinative as a matter at law of supervisory status.

Both common sense, and Board precedent, establish that the lawfulness of an employee's discharge be determined by his status at the time of discharge. See, e.g., *Ports of Call Travel Club,* 215 NLRB 22 (1974) (the percentage of time spent supervising in the three months immediately preceding the hearing determinative of the employee's supervisory status); *Marsellus Vault & Sales, Inc.,* 170 NLRB 898 (1968), *aff'd,* 431 F.2d 933 (2d Cir. 1970) (an employee who became a supervisor only shortly before an unfair labor practice was nonetheless excluded as a supervisor because he occupied that status at the most critical period before the acts in question); and *Mid Allegheny Corp.,* 233 NLRB 1463, 1465 (1977) (employee a supervisor even though he assumed position only 15 days prior). These precedents are directly applicable here, for in August of 1968, just about three months prior to his discharge, Mourning became qualified to fly as a pilot in command of a Jet Commander which under FAA Regulations requires the presence of a pilot and copilot, A3-p. 3 n.4 and p. 4, 238 NLRB at 669 n.4, and thereafter, he flew 38.2 hours as a pilot in command of a Jet Commander during his final three months. *Id.* Since transportation pilots average 30 to 40 hours of flight time a month (Tr. 250), Mourning had been

[8] Even the 5% overall figure is incorrect for, as noted by the ALJ, Mourning conceded that he in fact had a copilot more often than that. A2-p.4 n.3, 221 NLRB at 1181 n.3.

flying as the pilot in command of the Jet Commander with a copilot approximately 30% of the time at the time of discharge.

Moreover, even if Mourning had flown with a copilot only 5% of the time, he would, as a matter of law, be a supervisor for it had been well settled that:

> "It is not necessary that the employee be required regularly and routinely to exercise the powers set forth in the statute. It is the *existence* of the power which determines whether an employee is a supervisor." *Federal Compress & Warehouse Co. v. NLRB,* 398 F.2d 631, 634 (6th Cir. 1968) (emphasis added).

Once an individual actually possesses supervisory authority (as the ALJ found here and as a proper interpretation of Section 2(11) compels),

> "he thereupon becomes a (supervisor,) even before an opportunity arises to exercise his power, and even though he may not often find it necessary to exert the power conferred . . . even though in a particular instance months, or perhaps . . . even years, might pass before any occasion ever arose calling for an exercise of the power." *NLRB v. Leland-Gifford Co.,* 200 F.2d 620, 625 (1st Cir. 1952).

Indeed the Ninth Circuit had previously concurred holding that an employee with superisory power "is nonetheless a supervisor though he has *never* exercised that power." *Arizona Public Service Co. v. NLRB,* 453 F.2d 228, 230 (9th Cir. 1971) (emphasis added).

The instant decision of the Ninth Circuit thus places the Ninth Circuit in conflict not only with its own prior decisions but also with those of the First, Sixth and D.C. Circuits. Indeed the decision of the Ninth Circuit on this point is in conflict with that of the D.C. Circuit in this very case for the D.C. Circuit recognized that if Mourning's supervising authority over his

copilot was Section 2(11) authority, he must be excluded from the coverage of the Act as a supervisor.[9] [10]

Thus whereas the other Circuits have recognized that it is the *existence* of supervisory power which determines an employee's status under the Taft-Hartley Act, the Ninth Circuit in this case has held that such power must be frequently exercised. This holding is not only in conflict with the other Circuits but it conflicts with the Congressional intent in exempting supervisor from the Act and with this Court's decision in *Yeshiva* which was based upon the existence of managerial authority in the entire faculty, not the frequency of exercise. 444 U.S. 672, 100 S.Ct. at 863, n.17. To resolve these conflicts, certiorari must be granted.

3. The Board could not decide this case on the "uncontradicted evidence" for the evidence on the crucial issue of motivation is totally contradicted and the Ninth Circuit could not enforce the Board's decision based upon substantial evidence in the record as a whole, for the Board did not purport to base its decision upon the record as a whole.

The ALJ made no findings of facts on the underlying allegations of unfair labor charges and violations of Section 8(a)(3) and 8(a)(1) of the Act. Since the ALJ disposed of the case on the supervisory issue he concluded as to Mourning's discharge that it was "unnecessary to set forth the factual details surrounding that discharge or to reach a judgment concerning its underlying motivation." A2-p.6, 221 NLRB at 1181. Despite the lack of any credibility resolutions by the ALJ

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[9] See, also, *Amalgamated Clothing Workers v. NLRB*, 420 F.2d 1296, 1300 (D.C. Cir. 1969).

[10] In the past the Board itself has also recognized—as indeed it did initially in this case—that an employee is a supervisor even when he only supervises for a small percentage of his time as supervisor. See, e.g., *Ideal Roller & Manufacturing Co.*, 104 NLRB 931 (1953) (5% of time spent as a supervisor); *Pearl Packing Co.*, 116 NLRB 1489 (1956) (10% of time spent supervising).

who had observed the witnesses and despite the clear call by the General Counsel for a remand to the ALJ so that the necessary credibility resolutions could be made to resolve this matter (R.I.26, p. 4),[11] the Board purported to decide the issues concerning Mourning's discharge on the basis of the "uncontradicted testimony in the record." A3-p. 10 n.20; 238 NLRB at 671 n.20. But the factual issues here cannot be resolved by reference to the uncontradicted evidence because of the nature of the issues which must be resolved and the state of the record. This was well understood by the ALJ and by the General Counsel at an earlier stage in these proceedings and the failure of the Ninth Circuit to correct the Board's error in this regard requires the intervention of this Court in light of its supervisory responsibilities, the existence here of clear error, and the important consequences both to Charging Party himself and Petitioner should it be required to reinstate a pilot without the factual issues concerning his unsafe flying ever having been resolved.

The legal standard applicable with respect to Mourning's discharge is straightforward. As described by this Court in *NLRB v. Brown,* 380 U.S. 278, 288, 85 S.Ct. 980, 986 (1965):

> "[T]he Board must find from evidence independent of the mere conduct involved that the conduct was primarily motivated by an antiunion animus."

Or as the Ninth Circuit stated in *Pittsburgh—Des Moines Steel Co. v. NLRB,* 284 F.2d 74, 77 (9th Cir. 1960), "The crux of a violation of section 8(a)(1) or (3) is the true purpose or real motive of the employer in taking the action complained of." See also, *Stephenson v. NLRB,* 614 F.2d 1210, 1214 (9th Cir. 1980).

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[11] Petitioner had also noted that certain exceptions raised by other parties could not be resolved without credibility determinations and that credibility resolutions were the province of the ALJ who alone had the opportunity to observe the witnesses. MDC's "Answering Brief to Exceptions of General Counsel and Exceptions of Charging Party." R.I.23.

Here the Board attempted to infer antiunion animus from purportedly uncontradicted circumstantial evidence. In so doing, the Board ignored the only direct evidence of the purpose behind the discharge, which flatly contradicts the circumstantial evidence relied upon by the Board.[12] Thus, A. G. Heimerdinger, the MDC official who made the initial decision to discharge Mourning (Tr. 376) testified explicitly that he did not discharge Mourning for his union activity, but for cause;

> "Q: Mr. Heimerdinger, was your termination of Mr. Mourning based in any way upon Mr. Mourning's union activities?
> A: I had no idea he was active in the union activity, none whatsoever.
>
> Q: Mr. Heimerdinger I have one more question. Would you give us the specific reasons why you terminated Mr. Mourning?
>
> A: After reports that had collected and been informed to me from many people, such as the way he conducted flights in rough air, and incidents like Magu, and flying with personnel that personally reported to me, such as vice presidents who were pilots, even reported to me on how he conducted his flight.
>
> And so I came to the conclusion that after all these things had accumulated that I was going to release him. You can say fire or release or whatever, but I was going to

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[12] We do not suggest, of course, that the Board must accept this evidence because it is the only direct evidence of motivation. But because of this evidence, this matter cannot be decided on the basis of the "uncontradicted testimony." Indeed, the Ninth Circuit itself has previously recognized that a Board decision cannot be enforced where the Board relies upon inferences of motivation drawn from undisputed evidence which are in conflict with direct testimony of proper motivation credited by the Administrative Law Judge. *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1083-84 (9th Cir. 1977).

> release him, because I was considering the safety of the people that he might be flying in the future." (Tr. 405-06.)

Heimerdinger reiterated on cross-examination that he terminated Mourning for cause:

> "I released him for the reason that I didn't think he used and exercised good judgment as a pilot, and as a pilot we have to have discipline in the cockpit, and I don't think he exercised that, and I just released him because I think he was building up to something that might have endangered some people's lives." (Tr. 420.)

The MDC supervisor of labor relations, William Paine, who approved the discharge of Mourning similarly testified that the discharge was supported by cause, was not for union activity, and would not have been approved without just cause. (Tr. 266, 268-69, 271-72, 274.)

Although the Board and the Court of Appeals may have thought they had a very stale case on their hands and did not wish to extend the litigation any further, this is no excuse for permitting an important matter with conflicting evidence to be resolved without the credibility resolutions necessary for a proper decision. Indeed, in the past neither the Ninth Circuit nor the Board has hesitated to remand where necessary to insure that contested issues were properly resolved. See, e.g., *NLRB v. Western Clinical Laboratory, Inc.*, 571 F.2d 457, 461 (9th Cir. 1978), where, upon finding that neither the Administrative Law Judge nor the Board had made credibility determinations on a crucial point, the court held:

> "A remand to the Board is thus *necessary* to permit the Board to decide the credibility questions and to resolve the conflicts in the evidence . . . ." Emphasis added.

To the same effect are *Clear Pine Mouldings, Inc. v. NLRB*, 632 F.2d 721, 724 (9th Cir. 1980), cert denied, ___ U.S. ___, 49 U.S. Law Week 3863 (May 14, 1981) ("When conflicting

testimony is presented at a hearing, the administrative law judge, having observed the witnesses and heard the testimony, is *required* to determine the credibility of witnesses." Emphasis added) and *NLRB v. Martin A. Gleason, Inc.,* 534 F.2d 466, 472-74 (2d Cir. 1976) (Where issue of motivation is determinative, "resolution [of conflicting testimony] is necessary.")

The Board has been no less forthright in holding that its regulations *require* explicit credibility findings. See, for example, *Warehouse Union Local No. 860,* 228 NLRB 364 (1977) in which the Board remanded to its Administrative Law Judge "in order to make credibility resolutions, findings of fact, and conclusions of law consistent with the entire record, and to issue a supplemental decision thereon." In so holding, the majority of the Board noted:

> "Contrary to our dissenting colleague, we are not prepared to decide the merits herein without first having the Adminstrative Law Judge consider all the issues, including credibility, in light of Chessari's testimony described above. Unlike the dissent, we are not willing to find that the only conclusion that can be drawn from such testimony, if credited, is that the Union's alleged actions in calling Capel Klang were taken merely in enforcement of the parties' collective-bargaining agreement, considering all of the surrounding circumstances here. That is not to say that we are ruling out such a conclusion, but only that other conclusions might be drawn as well." 228 NLRB at 364, n.2.

In other words, the Board found that credibility resolutions could be dispensed with only if *fully crediting* the unresolved testimony would not affect the ultimate outcome.

If these principles are applied to the present case, it must be readily apparent that this matter cannot be properly resolved without making credibility determinations concerning the testimony of supervisors Heimerdinger and Paine for they each

testified that Mourning was terminated for cause and not union activity.[13] If their testimony concerning motivation is fully credited, the complaint in this action must be dismissed. This matter cannot therefore be properly resolved adversely to Petitioner without credibility resolutions being made.

Indeed, just how contradictory the evidence is in this matter is dramatically demonstrated by the General Counsel's letter of September 22, 1969, denying Mourning's appeal of the original dismissal of his charge.

> "Under all the circumstances, including the absence of evidence of Company knowledge of Mourning's Union activities prior to the discharge interview, the evidence that he had been previously reprimanded for poor job performance, that his latest wage increase had been an automatic increase, that there had not been a double vacuum pump failure due to overboosting, as determined by the engine's manufacturer, other than Mourning's, and that Quinn's alleged post-discharge statement was isolated in nature, insufficient basis existed for a finding that the Company had violated the Act as alleged." R.I.4, p. 8.

Nor can the Board's decision be enforced, as it was by the Ninth Circuit, on the basis that it is supported by substantial evidence in the record as a whole, for the Board did not purport to base its decision on the record as a whole. Instead, the Board relied only on inferences drawn from allegedly uncontradicted testimony and did not resolve the conflicts in the testimony

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[13] Similarly credibility resolutions must be made with regard to the alleged conversation between Quinn and Campbell, for Quinn denied having made the allegedly unlawful statements attributed to him by Campbell (Tr. 347-48, 364). Because the ALJ found Campbell to be a supervisor he found "no need . . . to make the credibility resolutions necessary to determine if they were in fact made." A2-p.7, 221 NLRB at 1181. Nor did the Board ever make such credibility resolutions purporting instead to resolve this matter upon the "uncontradicted testimony in the record." A3-p.10 n. 20, 238 NLRB at 671 n. 20.

which could be done only through credibility determinations. Thus since the Board's decision was not based on the record as a whole, it could not be enforced on that basis, for it is well settled that neither a reviewing court nor opposing counsel may substitute its own post hoc rationale for that of the agency being reviewed. The only remedy is to remand. *See, e.g., SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S.Ct. 1575 (1947):

> "a reviewing court, . . . must judge the propriety of [administrative agency] action solely by the grounds invoked by the agency."

See also NLRB v. Yeshiva University, 44 U.S. 672, 100 S.Ct. 856, 864 n. 22 (1980):

> "[A reviewing court can] not, of course, substitute counsel's *post hoc* rationale for the reasoning supplied by the Board itself."

For the same reason, it cannot be said that the Board made implicit credibility findings for the Board explicitly justified its deviation from its own rules requiring credibility resolutions[14] by stating that it was deciding the case upon the "uncontradicted testimony in the record," A3-p.10 n. 20, 238 NLRB at 671 n. 20.

These principles require the reversal of the Ninth Circuit's decision here in the exercise of this Court's supervisory authority. Indeed, the error is so clear, and the need for intervention so great, that we respectfully suggest summary reversal may be appropriate in order to insure that an unsafe pilot may not be reinstituted without any fact finder's ever having passed upon

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[14] *See, e.g., Stephenson v. NLRB*, 614 F.2d 1210, 1214 (9th Cir. 1980), in which the Court noted:

> "Board regulations require that a Board decision contain findings of fact, conclusions of law, and the reasons for those findings, upon all material issues of fact, law, or discretion presented on the record. 29 C.F.R. §§101.12(a) and 102.45(a) (1978). *Courts have remanded cases to the Board for specific findings when persuasive uncontradicted evidence does not exist to resolve a factual issue.*" Emphasis added.

the credibility of the testimony that Mourning was an unsafe pilot who was terminated for that reason.

We are not here dealing with a normal industrial job where a worker with ordinary skill may adequately substitute for another. Instead we are dealing with an airplane pilot whose attitude, habits, ideosyncrasies and shortcomings may seriously endanger the lives of others as well as valuable equipment intrusted to his care and judgment. Of course, no employee should ever be reinstated based on uncontradicted evidence where in fact there is direct evidence in total conflict. When, however, that individual is a pilot terminated for unsafe flying, the need to insure proper credibility resolutions to determine if in fact he was unsafe or whether his termination was pretextual renders the matter worthy of this Court's attention and intervention.

CONCLUSION

For each of the foregoing reasons, Petitioner prays this Court to grant its Petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this matter.

DATED: January 4, 1982

Respectfully submitted,

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By /s/ JAMES N. ADLER
James N. Adler

Appendix

McDONNELL DOUGLAS CORPORATION,
Appellant,
v.
NATIONAL LABOR RELATIONS BOARD,
Appellee,
and
Robert H. Mourning, Intervenor.
No. 79-7541.
United States Court of Appeals, Ninth Circuit.
Argued and Submitted Oct. 9, 1980.
Decided March 12, 1981.

The National Labor Relations Board found that an employer had committed unfair labor practices. The employer petitioned for review. The Board cross-petitioned for enforcement of its order. The Court of Appeals, Canby, Circuit Judge, held that: (1) in National Labor Relations Act section defining "supervisor" as an individual having authority in interest of employer to hire, etc., other employees, term "employees" was to be taken in accordance with definition of "employee" in the Act, and (2) airplane pilot who did not fly regularly with non-pilot crews when he was pilot in command and who had copilot on five percent of his flights and otherwise flew without crew and whose authority stemmed from his professional expertise and who exercised only authority needed to insure safety of airplane, passengers and crew, was not a "supervisor" within the Act.

Petition to review and set aside order denied, and enforcement of order granted.

1. Labor Relations—67

Under National Labor Relations Act section defining "supervisor," worker who exercises any one of listed powers is supervisor. National Labor Relations Act, § 2(11) as amended 29 U.S.C.A. § 152(11).

See publication Words and Phrases for other judicial constructions and definitions.

2. Labor Relations—67

In National Labor Relations Act section defining "supervisor" as an individual having authority in interest of employer to hire, etc., other employees, term "employees" was to be taken in accordance with definition of "employee" in the Act. National Labor Relations Act, § 2(3, 11) as amended 29 U.S.C.A. § 152(3, 11).

See publication Words and Phrases for other judicial constructions and definitions.

3. Labor Relations—67

In National Labor Relations Act definition of supervisor, term "other employees" imports that supervisory authority is exercised over other employees of same employer. National Labor Relations Act, § 2(3, 11) as amended 29 U.S.C.A. § 152(3, 11).

See publication Words and Phrases for other judicial constructions and definitions.

4. Labor Relations—67

To qualify as "supervisor," within National Labor Relations Act, it is only necessary that person supervise statutory "employees" directly or indirectly through chain of command. National Labor Relations Act, § 2(3, 11) as amended 29 U.S.C.A. § 152(3, 11).

5. Labor Relations—67

Airplane pilot who did not fly regularly with nonpilot crews when he was pilot in command and who had copilot on five percent of his flights and otherwise flew without crew and whose authority stemmed from his professional expertise and who exercised only authority needed to insure safety of airplane, passengers and crew, and only over others of equal rank, was not a "supervisor" within the Act. National Labor Relations Act, §§ 2, 2(3, 11), 10(c) as amended 29 U.S.C.A. §§ 152, 152(3, 11), 160(c).

6. Labor Relations—561

Evidence compelled finding that employer fired employee, an airplane pilot, because of his union activity, in view of evidence indicating that vacuum pump incident was mere pretext for discharge. National Labor Relations Act, § 8(a)(1, 3), as amended 29 U.S.C.A. § 158(a)(1, 3).

7. Labor Relations—598

It was not improper for National Labor Relations Board to find that employee was fired for union activity and to make such finding without remanding to administrative law judge for credibility finding, in view of fact that employer never clearly asked for such relief and that Board did not act improperly but rather found sufficient facts established by uncontradicted testimony to conclude that employee was discharged for union activity and to reject as pretextual the explanations offered by employer. National Labor Relations Act, § 8(a)(1, 3), 10(f) as amended 29 U.S.C.A. § 158a(1, 3), 160(f).

8. Labor Relations—557

In view of evidence, it was within power of National Labor Relations Board to find that employee was warned not to engage in union activity. National Labor Relations Act, § 8a(1, 3) as amended 29 U.S.C.A. § 158a(1, 3).

Petition for Enforcement of an Order of the National Labor Relations Board.

Before SCHROEDER and CANBY, Circuit Judges and PFAELZER, District Judge.*

CANBY, Circuit Judge.

The National Labor Relations Board found that McDonnell Douglas had committed unfair labor practices in violation of §§ 8(a)(1) and 8(a)(3) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and (3), by firing

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* The Honorable Mariana R. Pfaelzer, United States District Judge, Central District of California, sitting by designation.

Robert Mourning for union activity and by warning Malcolm Campbell not to become involved in union activity. McDonnell Douglas petitioned this court for review under § 10(f) of the Act, 29 U.S.C. § 160(f). The Board crosspetitioned for enforcement of its order to cease the unfair labor practices and to reinstate Mourning with back pay. Mourning intervened in support of the Board. We enforce the Board's order.

I.

McDonnell Douglas employed five transport pilots, including Mourning and Campbell, to ferry company executives and other persons between company facilities in southern California. The transport pilots also flew "chase" missions, photo missions, test flights, and instruction flights for new company pilots. Usually, the transport pilots flew alone, but some flights required a copilot. The transport pilots therefore alternated as pilots in command and copilots; their job required that they serve in each position at different times. Mourning usually flew as pilot in command. On approximately five percent of his flights as pilot in command, he had a copilot. Otherwise, he flew without a crew. On another five percent of his flights, he was accompanied by a pilot trainee. Occasionally, he was accompanied by a photographer or observer.

Mourning became interested in organizing a pilots' union in late 1967. He talked to his fellow pilots about organizing, and mailed them literature from the Airline Pilots Association. He also talked about the union to his supervisor, Orion Quinn. He approached company officials to talk about working conditions. At a meeting in mid-1968, A. G. Heimerdinger, director of flight operations, told Mourning that if he did not like the way the company was being run, he should leave. In May 1968, Heimerdinger sent a memo to the company president to advise him that the pilots were organizing. In June 1968, another memo written by the company's assistant supervisor of labor relations identified Mourning as one of three pilots behind the union movement.

Mourning was fired on November 15, 1968. Heimerdinger told him that he was fired because he had blown out two vacuum pumps during a flight on the preceding September 30. Heimerdinger said the incident was "a matter of misoperation of the aircraft which involved safety considerations." During the September 30, flight, two vacuum pumps had failed. Mourning was pilot in command of the plane but a copilot had actually operated the controls. Mourning reported the failure to company mechanics, and the vacuum pumps were replaced. The mechanics also found scorched paint on the engine cowling, suggesting overheating. Heimerdinger ordered a complete inspection of the plane, but no other damage was found. Mourning was not reprimanded at that time.

After Mourning's discharge, Quinn told Campbell not to get involved in the "politics" that was stirring up the pilots. Quinn said that if Campbell just did his job and avoided the "malcontents", he would be better off in the long run. Quinn told Campbell that the order to fire Mourning had come "from the top," and that if Mourning had not been so open about the union, he would not have been fired. Within 30 days of Mourning's discharge, Campbell blew out vacuum pumps on two separate planes, but he was not discharged. On other occasions, pilots blew out tires during landing, flew planes into power lines, and ran planes into fixed objects on the ground, but none of the pilots was fired as a result.

Mourning filed an unfair labor practice charge against McDonnell Douglas. An administrative law judge found that Mourning and Campbell were supervisors who were not protected by the Act. The Board affirmed the ALJ's decision and dismissed the complaint. 221 N.L.R.B. 1180 (1975). On appeal, the D.C. Circuit remanded to the Board to consider whether Mourning's crew ever consisted of persons who were "employees" within § 2(3) of the Act or were merely pilots of equal rank. *Mourning v. NLRB*, 559 F.2d 768 (D.C.Cir.1977). On remand, the Board decided that Mourning and Campbell were not supervisors because they exercised authority only over other pilots like themselves, and that in any event the exercise

of this authority was too sporadic and routine to make them supervisors. The Board then found that McDonnell Douglas had used the vacuum pump incident as a pretext to fire Mourning, and that his discharge was really intended to discourage union activity. It therefore found that McDonnell Douglas violated §§ 8(a)(1) and 8(a)(3) by firing Mourning. The Board also found that Quinn's comments to Campbell were a warning not to engage in union activity and therefore violated § 8(a)(1).

II.

The initial issue in this case may be simply stated: Are Mourning and Campbell supervisors? If they are, then they are not entitled to the protections of § 7 of the National Labor Relations Act, and the employer, McDonnell Douglas, may fire Mourning for any reason or for no reason. *Kaiser Engineers v. NLRB,* 538 F.2d 1379, 1382 (9th Cir. 1976). The evidence focused on Mourning's status. The Board found that Mourning was not a supervisor. We must accept that decision if it is supported by the record and has a reasonable basis in law. *NLRB v. Hearst Publications, Inc.,* 322 U.S. 111, 131, 64 S.Ct. 851, 860, 88 L.Ed 1170 (1944); *Laborers & Hod Carriers, Local No. 341 v. NLRB,* 564 F.2d 834, 837 (9th Cir. 1977).

[1] The definition of supervisor is found in § 2(11) of the Act, 29 U.S.C. § 152(11):

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

A worker who exercises any one of the listed powers is a supervisor. *Arizona Public Service Co. v. NLRB,* 453 F.2d 228, 230 (9th Cir. 1971); *NLRB v. Fullerton Publishing Co.,* 283 F.2d 545, 548 (9th Cir. 1960). For our purposes, a supervisor is one who used independent judgment responsibly to direct other employees in the interest of the employer.

[2-4] The definition of "supervisor" in § 2(11) depends upon the meaning of "other employees." McDonnell Douglas argues that "other employees" should be given its everyday meaning, i. e., other persons who work for the employer. Such a definition would include the copilots who flew with Mourning when he was pilot in command. That would make Mourning a supervisor, since to some extent he directed his copilots when he was pilot in command.

The NLRB, however, accepted the invitation of the District of Columbia Circuit and held that "employees" in section 2(11) must be defined as provided in § 2(3), 29 U.S.C. § 152(3). That definition states:

> § 2. Definitions.
>
> When used in this subchapter—
>
> * * * * * *
>
> (3) The term "employee" shall include any employee . . . but shall not include . . . any individual employed as a supervisor. . . .

With this definition in effect, it cannot sensibly be maintained that Mourning is a supervisor by reason of his authority over his fellow pilots. The reason for that conclusion is that if Mourning is a supervisor, then so must his copilots be supervisors. Mourning and his fellow pilots serve interchangeably as pilots in command and copilots. If they are all supervisors, they cannot be "employees" by reason of § 2(3). That would mean that the pilots would be supervisors with no employees to supervise. Yet, § 2(11) defines "supervisor" as one who exercises authority over "employees." Defining the pilots as "supervisors" therefore becomes a logical impossibility under

the Act. The escape from this logical dilemma is to hold, as the Board did, that in their relation to each other, the pilots are employees and not supervisors.

We agree with the Board's conclusion that "employees" as used in § 2(11) must be defined in accordance with § 2(3). In addition to the logical difficulties attending the contrary approach, there are several reasons why we believe the Board was correct and McDonnell Douglas wrong. The first arises from the plain words of § 2. All of the definitions, including that of "employee", apply to the terms "when used in this subchapter." Section 2(11) is not only in the same subchapter, it is in the very same definitional section containing § 2(3). It seems highly likely that Congress, in constructing this definitional section, would intend that the defined terms interrelate.[1]

It is true that the § 2(3) definition of "employees" was held not to limit the power of the Board under § 10(c) to order "such affirmative action including reinstatement of employees . . . , as will effectuate the policy of this Act." *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 61 S.Ct. 845, 85 L.Ed. 1271 (1941). In that case, however, the Court found that the broad purposes of § 10(c) militated in favor of permitting the Board to reinstate strikers who had found equivalent employment even though they would be excluded from the definition of "employee" provided by § 2(3). No such policy reasons exist in the present case to over-come the usual presumption that the plain words of § 2 mean what they say.

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[1] As stated in the text, § 2(11) refers to supervisory authority over "other employees." Our conclusion that "employees" is defined by § 2(3) does not render the word "other" superfluous; its import, however imperfectly stated, is to require that the supervisory authority be exercised over other employees of the *same employer. Mourning v. NLRB,* 559 F.2d 768, 770 n.3 (D.C.Cir.1977); *Illinois State Journal-Register, Inc. v NLRB,* 412 F.2d 37, 43-44 (7th Cir. 1969).

We reject the argument of McDonnell Douglas that the Board's ruling would render a company president who supervised only supervisors an "employee" within the meaning of the Act. To qualify as a supervisor, it is only necessary that a person supervise statutory "employees" directly or indirectly through a chain of command.

Indeed, the policies underlying the Act militate in favor of applying the definition of § 2(3) in the present case. It is important for the Board not to construe supervisory status too broadly, for a worker who is deemed to be a supervisor loses his organizational rights. *Westinghouse Electric Corp. v. NLRB,* 424 F.2d 1151, 1158 (7th Cir.) *cert. denied,* 400 U.S. 831, 91 S.CT. 63, 27 L.Ed.2d 62 (1970). The purpose of excluding supervisors from the protection granted by the Act to employees is that the status of the two groups in relation to each other is fundamentally inconsistent. Supervisors are not included in the bargaining unit of employees because their supervisory function would create conflicts of interest in dealing with employees in the unit. H.R.Rep.No. 245, 80th Cong., 1st Sess. 14 (1947). No such representational conflict occurs when one pilot deals with another pilot whose relationship to management is exactly the same as his own. In this case, Mourning and the other pilots were equals, each of whom had the job of serving interchangeably as pilot in command and as copilot. As equals, they all had to be regarded as supervisors or all as employees. If supervisors, they were excluded from the benefits of the Act, even though there was no representational conflict to justify the exclusion. The Board chose the better alternative of treating them all as employees and bringing them within the protection of the Act.

[5] McDonnell Douglas argues that this result is contrary to a trilogy of the Board's prior decisions. In *Douglas Aircraft Co.,* 207 N.L.R.B. 682 (1973), *McDonnell Aircraft Co.,* 207 N.L.R.B. 684(1971), and *Lockheed-California Co.,* 207 N.L.R.B. 686 (1973), the Board held that pilots in command who flew regularly with non-pilot crews were supervisors. Our review of the record substantiates the Board's finding that Mourning did not exercise supervisory authority over non-pilot crew members. Consequently, we do not see an inconsistency between the result in this case and the Board's decisions in the trilogy.

This case is different from the trilogy in three respects. First, Mourning did not fly regularly with non-pilot crews when he was pilot in command. He had a copilot on five percent of

his flights. Otherwise, he flew without a crew. McDonnell Douglas argues that Mourning was accompanied by a pilot trainee on five percent of his flights. The Board has consistently held, however, that an instructor-trainee relationship is different from a supervisor-employee relationship. *See Rub-R Engraving Co.,* 89 N.L.R.B. 475 (1950); *Petroleum Helicopters, Inc.,* 184 N.L.R.B. 60 (1970); *Ball Plastics Division,* 228 N.L.R.B. 633 (1977). McDonnell Douglas also argues that Mourning flew with photographers and observers. The record does show that Mourning occasionally carried a photographer or observer on his flights. The Board found, however, that these employees were mere passengers, not members of Mourning's crew. Authority exercised by a pilot over passengers is not supervisory authority. *Mourning v. NLRB,* 559 F.2d at 771 n.4.

Second, Mourning did not exercise the same type of authority over his copilots as the trilogy pilots did over their crew members. In the trilogy, the pilots exercised supervisory authority in the true sense of the word. The pilots assigned duties to crew members, and on over-night flights decided when the crew worked and when they took time off. In this case, however, Mourning's authority stemmed from his professional expertise. He exercised only the authority needed to insure the safety of the airplane, passengers, and crew. Such authority is an intrinsic part of any pilot's job. Taken alone, it does not necessarily prove that Mourning is a supervisor. *See Kaiser Engineers v. NLRB,* 538 F.2d at 1384; *NLRB v. Doctors' Hospital,* 489 F.2d 772, 776 (9th Cir. 1973).

Finally, the Board held that even if Mourning's authority over his copilots were supervisory in nature, it was too sporadic to permit a finding that he was a supervisor within the meaning of the Act. We believe that substantial evidence in the record supports that ruling. Mourning flew with a copilot only about 5% of his overall flight time. Such an infrequent exercise of supervisory authority may reasonably be viewed as insufficient to render § 2(11) applicable. *Plastic Workers Union v. NLRB,* 369 F.2D 226, 230 (7th Cir. 1966); *see NLRB v. Lindsay*

Newspapers, Inc., 315 F.2d 709, 712 (5th Cir. 1963). This is particulary true when the occasional direction is exercised over fellow workers of equal rank. *NLRB v. Doctors' Hospital*, 489 F.2d at 776; *see NLRB v. Security Guard Services, Inc.*, 384 F.2d 143 (5th Cir. 1967). Consequently, we do not believe that adherence to the trilogy dictates a decision in favor of McDonnell Douglas in this case.

III.

Once the Board decided that Mourning and Campbell were not supervisors, it faced the question whether McDonnell Douglas had committed the alleged unfair labor practices. We agree that McDonnell Douglas's actions in this case violated §§ 8(a)(1) and 8(a)(3) of the Act.

[6] The Board found that McDonnell Douglas had fired Mourning because of his union activity. Specifically, the Board found that the vacuum pump incident was merely a pretext for his discharge. We agree. Heimerdinger said that he discharged Mourning because the vacuum pump incident demonstrated his inattention to safety considerations. Yet Mourning was regarded as a competent pilot by his fellow pilots and by Quinn, his immediate superior. Heimerdinger did not reprimand Mourning immediately after the incident. In fact, Heimerdinger granted Mourning a merit increase in pay after the incident occurred. Other pilots who were guilty of the same or worse conduct were not fired. We think the Board was clearly justified in concluding that Heimerdinger seized upon the vacuum pump incidnet to rid himself of Mourning. McDonnell Douglas officials were concerned about union activity among the pilots. Mourning had been identified as one of three pilots behind the union movement. Quinn even told Campbell that Mourning would not have been fired if he had not been so open about his union activities. The Board could not avoid the conclusion that Mourning's union activity was the "moving cause" behind his discharge. *Stephenson v. NLRB*, 614 F.2d 1210, 1213 (9th Cir. 1980).

[7] McDonnell Douglas argues that it was improper for the Board to make this finding without remanding to the ALJ for credibility findings. We disagree. First, McDonnell Douglas never clearly asked the Board for this relief. In any event, the Board did not act improperly. Contrary to McDonnell Douglas' contention, the Board did not proceed on the erroneous assumption that there was no contradiction in testimony over the ultimate question of anti-union animus. Instead, the Board found sufficient facts established by uncontradicted testimony to permit it readily to conclude that Mourning was discharged for his union activity, and to reject as pretextual the explanations offered by company officials. There was no need in this instance to remand for credibility findings; the Board was free to draw its own inferences from the record. *NLRB v. Pacific Grinding Wheel Co.*, 572 F.2d 1343, 1347 (9th Cir. 1978); see *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1079 (9th Cir. 1977). Its opinion clearly sets forth the inferences it drew and the substantial evidentiary bases for them.

[8] The Board also interpreted Quinn's comments to Campbell as a warning not to engage in union activity. That finding was similarly within the power of the Board and was supported by substantial evidence. We will therefore not set it aside. *NLRB v. Ayer LarSanitarium*, 436 F.2d 45, 48 (9th Cir. 1970).

We conclude that the Board committed no error and that substantial evidence on the record as a whole supports its findings that McDonnell Douglas' actions violated §§ 8(a)(1) and (3) of the Act. The petition to review and set aside the Board's order is denied, and enforcement of the Board's order is granted.

Douglas Aircraft Company, a Component of McDonnell Douglas Corporation and Robert H. Mourning. Case 31-CA-1435

December 16, 1975

DECISION AND ORDER

BY CHAIRMAN MURPHY AND MEMBERS JENKINS AND WALTHER

On May 6, 1975, Administrative Law Judge Richard J. Boyce issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Party[1] filed exceptions and supporting briefs, and the Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Adminstrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

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[1] The Charging Party's request for oral argument is hereby denied as the record, the exceptions, and briefs adequately present the issue and positions of the parties.

DECISION

I. STATEMENT OF THE CASE

RICHARD J. BOYCE, Administrative Law Judge: This case was heard in Los Angeles, California on March 18-20, 1975. The charge was filed on May 9, 1969, by Robert H. Mourning, an individual. The complaint issued November 16, 1972, alleging that Douglas Aircraft Company, a Component of the McDonnell Douglas Corporation (herein called Respondent) had violated Section 8(a)(1) and (3) of the National Labor Relations Act.

The Board, by decision reported at 202 NLRB 305 (1973), dismissed the complaint on procedural grounds. That dismissal was reversed in *Mourning* v. *N.L.R.B.*, 505 F.2d 421 (C.A.D.C., 1974), after which the Board, by order dated January 14, 1975, remanded the case to the Regional Director for Region 31 "for a hearing on the matters raised by the complaint." A notice of hearing dated February 3, 1975, thereupon issued, and the hearing ensued.

The parties were permitted at the hearing to introduce relevant evidence, examine and cross-examine witnesses, and argue orally. Briefs were filed for the General Counsel, the Charging Party, and Respondent.

II. ISSUES

The issues are whether Respondent:

(a) By its discharge of Mourning on November 15, 1968, violated Section 8(a)(3) and (1) of the Act.

(b) Through its admitted agent and supervisor, Orion Quinn, beginning on or about November 18, 1968, threatened and interogated employees regarding their union sympathies and activities, violating Section 8(a)(1) of the Act.

Underlying both of these issues is that of whether Mourning, as a transport pilot, and the pilot to whom Quinn allegedly made 8(a)(1) remarks, at relevant times were employees rather than supervisors under the Act.

III. JURISDICTION

Respondent is a Maryland corporation engaged at various locations in the United States, including Long Beach, California, in the manufacture of aircraft and related items. It annually sells and ships from its Long Beach facility, directly to customers outside California, products valued in excess of $50,000.

Respondent is an employer engaged in and affecting commerce within Section 2(2), (6), and (7) of the Act.

IV. LABOR ORGANIZATION

Air Line Pilots Association (herein called the Union) is a labor organization within Section 2(5) of the Act.

V. THE SUPERVISORY ISSUE

A. *Facts*

Respondent, at times in question, had approximately 25 pilots and 10 flight engineers at its Long Beach facility. Included among the pilots were about five transport pilots, plus a number of production test pilots and engineering test pilots.

Mourning was a transport pilot at the Long Beach facility from December 1965 until the discharge in question.[1] As such, his primary duty was to operate airplanes among Respondent's various facilities, transporting Company executives and flight crews, representatives of customers, government officials, and

[1] Transport pilots were called "reserve pilots" until January 1967.

cargo. Most of his flights were less than an hour in duration, between points in Southern California; some were interstate. He also flew occasional "chase" planes in accompaniment of experimental planes being tested;[2] sometimes himself took planes on test flights after they had undergone periodic ground inspection; sometimes was assigned as "check pilot" in the indoctrination of newly hired pilots; and sometimes flew on photography missions, in which the plane he occupied was a camera platform for the taking of promotional pictures of DC8's and DC9's.

Mourning, as pilot was the sole crew member on most of his transport flights. He sometimes had a copilot, however, and he sometimes was copilot on these flights. The same was true of the chase missions.[3] Specific evidence is lacking that Mourning ever had a crew when he flew post-inspection test flights, although Walter Kent, Respondent's then director of test administration and support, credibly testified that a copilot, a mechanic, and an engineer sometimes crewed this kind of flight. As check pilot for new hires, Mourning and others in that role reported to their superiors on the competence and progress of new pilots, and recommended ways to improve their performance. Regarding the photography missions, Mourning generally flew as copilot because of a lack of qualifications for flying of that highly precise nature, occupying the "left chair"—i.e., the seat of the pilot in command—only in controlled situations to enhance his qualifications.

Mourning, as pilot in command, and all other of Respondent's pilots in that role, had ultimate nondelegable responsibility for the success of the mission. This included responsibility for the safety of passengers and crew, if any, and for the

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[2] The chase plane served as extra "eyes" to see that the plane being tested did not proceed into areas of congestion, and to establish a fix should a test plane go down.

[3] Mourning testified that 95 percent of his flying time was in planes in which no copilot was required by regulations. He conceded, however, that he in fact had a copilot more often than that; and the weight of evidence reveals that the presence of a copilot sometimes was dictated by the nature of the mission, regulations aside.

preservation of the equipment. Thus, the pilot in command had authority to direct the copilot in the way he performed his duties, overriding the copilot's judgment and actions if necessary. Similarly, if conduct of others aboard created a safety hazard or or otherwise imperiled the success of a mission, the pilot in command was empowered to take appropriate action.

In short, the pilot in command—Mourning included, when he served in that role—was the unquestioned captain of the ship, with all of the responsibilities and prerogatives that that implies.

B. *Discussion*

In a "trilogy" of representation case decisions postdating the conduct in question by about 5 years, one of which involved the pilots at Respondent's Long Beach facility,[4] the other two involving pilots at similar facilities of other aircraft manufacturers,[5] the Board concluded, in the words of one of the decisions, that pilots who "serve some of their time as captains, at which time they are responsible for, and in complete control of, the plane and all persons on board," are supervisors under the Act.[6] Included in the sweep of this conclusion were transport pilots, so called, with duties much like those of Respondent's transport pilots—Mourning included—at time relevant to this case.

If there be a factual distinction between those cases and the case at hand, it is that Mourning and his colleagues, circa 1968, perhaps spent a relatively larger proportion of their flying time without other crew members aboard. But, from a reading of those decisions and a careful study of the present record, it is not clear that this is so; and, in any event, this at best would be

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[4] *Douglas Aircraft Company, a Component of the McDonnell Douglas Corporation*, 207 NLRB 682 (1973).

[5] *Lockheed-California Company*, 207 NLRB 686 (1973); *McDonnell Aircraft Company*, 207 NLRB 684(1973).

[6] *Douglas Aircraft Company; a Component of the McDonnell Douglas Corporation, supra.*

a distinction in degree and not kind since Mourning and his contemporaries did spend significant flight time as pilots in command with at least one subordinate crew member, a copilot, on board.

It is concluded, therefore, that the trilogy decisions are controlling of the status of Respondent's transport pilots, Mourning included, and that they were supervisors within the Act at the relevant times.[7]

VI. The Alleged Unfair Labor Practices

A. *Mourning's Discharge*

Having concluded that Mourning was a statutory supervisor, it follows that his discharge, even if union-connected, did not violate the Act. It therefore is unnecessary to set forth the factual details surrounding that discharge or to reach a judgment concerning its underlying motivation.

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[7] The General Counsel's brief cites four cases in which certain pilots were found to be "employees" within Sec. 2(3) of the Act: *Sis-Q Flying Service,* 197 NLRB 195 (1972); *Petroleum Helicopters,* 184 NLRB 60 (1970); *Air California,* 170 NLRB 18 (1968); and *Gary Sheet Production Corporation,* 116 NLRB 1192 (1956). Other cases of the same genre include *E. W. Wiggins Airways,* 210 NLRB 996 (1974), and *Panorama Air Tour,* 204 NLRB 45 (1973). None of these cases, however, is as factually opposite to the present situation as are the trilogy decisions. Moreover, in only one of these cases, *Petroleum Helicopters,* was the supervisory issue raised as concerns pilots, the result being that 11 so-called lead pilots were found to be supervisors and 3 other pilots were found not to be inasmuch as "the record is devoid of evidence to establish their supervisory status." 184 NLRB 61.

Without conceding Mourning to be a supervisor under the trilogy standard, counsel for the Charging Party argues vigorously and at length that the trilogy decisions are "simply wrong" as a matter of law. Given the recency of those decisions and the likelihood that the Board fully weighted the considerations posed by counsel preliminary to their issuance, it would seem appropriate that any departure from them come first from the Board.

B. *The Utterances of Orion Quinn*

There is evidence that Quinn made certain comments to Malcolm Campbell, one of Respondent's transport pilots, that arguably would have violated Section 8(a)(1) were Campbell an employee under the Act. Consistent with the earlier conclusion that Respondent's transport pilots were supervisors, however, it is concluded that the comments attributed to Quinn were not unlawful. Accordingly, there is no need to set forth the substance of those alleged comments or to make the credibility resolutions necessary to determine if they in fact were made.

Conclusions of Law

1. Respondent is an employer engaged in and affecting commence within Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not violate the Act as alleged.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[8]

The complaint is dismissed in its entirety.

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[8] All outstanding motions inconsistent with this recommended Order hereby are denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DOUGLAS AIRCRAFT COMPANY,
A COMPONENT OF MCDONNELL
DOUGLAS CORPORATION

Case 31—CA—1435

and

ROBERT H. MOURNING

SUPPLEMENTAL DECISION AND ORDER

On December 16, 1975, the National Labor Relations Board issued its Decision and Order in this proceeding,[1] in which it affirmed an Administrative Law Judge's finding that Robert H. Mourning, the Charging Party herein, was a supervisor within the meaning of Section 2(11) of the Act, and, accordingly, that Respondent had not violated Section 8(a)(3) and (1) of the Act by discharging him on November 15, 1968. Thereafter, on May 13, 1977, the United States Court of Appeals for the District of Columbia remanded this proceeding to the Board[2] to consider the legal issue raised by Charging Party Mourning of whether an individual is a supervisor under Section 2(11) of the Act if it is found he only exercises supervisory authority over individuals who are themselves excluded from the definition of employees under Section 2(3) of the Act.[3] The court further remanded this proceeding to the

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[1] 221 NLRB 1180 (1975).

[2] *Robert H. Mourning* v. *N.L.R.B.* 559 F.2d 768 (C.A.D.C., 1977) (Judge MacKinnon dissenting).

[3] Sec. 2(11) of the National Labor Relations Act provides that the "term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." Sec. 2(3) of the National Labor Relations Act provides: The "term 'employee' shall include any employee. . . but shall not include any individual employed as a supervisor. . . ."

Board for clarification of the factual questions whether Mourning's crew ever consisted of persons who were "employees" within Section 2(3) or were merely pilots like himself; and, if his crew was composed of employees, whether the authority he exercised over them was not too sporadic and/or routine to warrant classifying him as a supervisor under the Act. Thereafter, on July 6, 1977, the Board notified the parties that it had accepted the remand from the court of appeals and that the parties had the opportunity to file statements of position with the Board with regard to the issues remanded. Counsel for the General Counsel, for the Charging Party, and for Respondent thereafter filed statements of position on remand with the Board.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the entire record in this case, including the statements of position on remand and, for the reasons stated below, finds that Charging Party Mourning was not a supervisor within the meaning of the Act at the time of his discharge and further that his discharge was for reasons proscribed by the Act.

The record reveals that Respondent at times material herein employed approximately 50--55 pilots at its Long Beach, California, facility, including 5 transport pilots. Transport pilots were qualified to fly light aricraft, such as Aero-Commanders and Cessnas. Production test pilots and engineering test pilots had the same basic qualifications as transport pilots, but, in addition, were qualified to fly larger commercial passenger-type aircraft which were manufactured and assembled at Respondent's Long Beach, California, plant.

At the time of his discharge on November 15, 1968, Charging Party Mourning was classified as a transport pilot in Respondent's business fleet.[4] Mourning flew the transport planes, carrying cargo and Respondent's officials, employees, customers, and other persons, in and around Los Angeles and occasionally interstate. He also flew the transports on "chase" and "photo" missions,[5] postinspection test flights,[6] and training flights.[7] The Cessnas and Aero-Commanders had a left and right seat for the pilot-in-command and the copilot, respectively, but Federal regulations did not require that a copilot be assigned as part of the crew. However, Respondent's own regulations required a copilot in severe weather for safety reasons.[8]

Charging Party Mourning flew as a pilot of transport aircraft, which under Federal regulations did not require a copilot about 95 percent of the time he worked for Respondent. The Administration Law Judge found that Mourning sometimes did have a copilot on chase flights, but that specific evidence was lacking that he ever had a copilot on postinspection test flights.[9] Mourning estimated that about five percent of the time a pilot would fly the right seat with him

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[4] When discharged, he was rated to fly Cessnas and Aero-Commanders (which were small twin-engine propeller-driven planes), and the Jet Commander, a jet-engine aircraft. He had only become rated to fly the Jet Commander on August 6, 1968, some 3 months before he was discharged. Since his hire at Respondent, he had logged about 1,774 hours as a pilot in command, including only 38.2 hours in the Jet Commander. He had flown about 256 hours as a copilot.

[5] On the chase missions, he would follow another plane, which was on a test flight, for surveillance, and to assist in rescue if necessary; on photo missions, a company photographer went along to take pictures of a plane in flight.

[6] These flights took place after normal maintenance and inspection procedures were completed.

[7] These training flights were to instruct new pilots.

[8] The record does not show how often this occurred.

[9] Contrary to Respondent's assertion in its statement of position, the Administrative Law Judge did not credit the testimony of former Director of Test Administration and Support Walter Kent that, on postinspection flights, Mourning himself sometimes had a crew consisting of a copilot, a mechanic, and an engineer.

pursuant to company assignment and that on or about five percent of his flights as pilot-in-command in transports he was accompanied by a new hire, who was becoming acquainted with the pilot's routine. Mourning and others like him reported to their superiors on the competence and progress of the new pilots, but Mourning never assisted in the determination of whether to promote, terminate, or continue training a particular pilot. Contrary to Respondent's contention in its statement of position on remand, there is no evidence that Mourning ever had anyone but pilots as members of his crew.[10]

As noted supra, on August 6, 1968, Mourning was rated for assignment as a pilot to fly Jet Commander aircraft. Federal regulations required that a pilot be assigned as copilot in this type aircraft. But Mourning flew the Jet Commander as pilot-in-command with a copilot a total of only 38.2 hours before he was discharged. The record contains no specific evidence identifying the pilots who were designated as copilots in Jet Commander flights with Mourning, but admittely some were so selected.

In all those cases where Mourning had another pilot assigned as a crew member, that pilot had to be qualified to fly the plane in case of emergency. In addition, the duties of the pilot-in-command and the copilot on normal flights included the responsibility to execute the various procedures prescribed on a checklist, as required by Federal regulations and/or Respondent's policy, which related solely to flying the particular aircraft. Thus, before the pilot and the copilot entered the plane, each would know precisely what technical functions each would be required to perform during a particular flight.

The Administrative Law Judge in the earlier proceeding found that Mourning, as pilot-in-command (as with all other pilots in that role), had ultimate, nondelegable responsibility

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[10] Respondent's assertion that Mourning admitted that he often flew as pilot-in-command with his aircraft full of personnel including copilots, flight engineers, and test engineers is inapt. The clear import of the record is that personnel on board, besides other pilots sometimes acting as copilots, were passengers only, and not crew members.

for the success of the mission. This included responsibility for the safety of the passengers, and crew, if any, and for the preservation of equipment. The Administrative Law Judge found that the pilot-in-command could direct the copilot in the way he performed his duties and could override the copilot's judgment and actions if necessary. And he noted that if the conduct of others aboard created a safety hazard or otherwise imperiled the success of the mission, the pilot-in-command was empowered to take appropriate action. In reaching his conclusion that Mourning was a statutory supervisor, the Administrative Law Judge relied heavily on three Board decisions postdating the conduct in question here by about 5 years. One of those decisions involved the pilots at Respondent's Long Beach facility, and the other two involved pilots at similar facilities of other aircraft manufacturers.[11] The Administrative Law Judge noted that the Board had concluded in one of those cases that pilots who "serve some of their time as captains, at which time they are responsible for, and in complete control of, the plane and all persons on board" were supervisors under the Act.[12] The Administrative Law Judge found that in those cases transport pilots with duties much like Mourning's were included in this earlier finding and, accordingly, he found Mouring to be a statutory supervisor, a conclusion which the Board affirmed.

Upon appeal of the Board's decision, however, the United States Court of Appeals for the District of Columbia Circuit, as noted, remanded this proceeding to the Board for further consideration of a number of issues. The court majority noted Mourning's argument that "all of the transport pilots exercised . . . command authority, vis-a-vis each other, from time to time," but they never "exercised such authority over other employees."[13] Accordingly, under Mourning's argument, such

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[11] These cases to which the Administrative Law Judge referred were *Douglas Aircraft Company, a Component of the McDonnell Douglas Corporation,* 207 NLRB 682 (1973); *McDonnell Aircraft Company, a Division of McDonnell Douglas Corporation,* 207 NLRB 684 (1973); *Lockheed-California Company, a Division of Lockheed Aircraft Corporation,* 207 NLRB 686 (1973).

[12] *Douglas Aircraft Company, supra,* 207 NLRB 682.

[13] *Robert H. Mourning, supra,* at 769.

pilots could not be supervisors because they never responsibly directed "employees" under the Act. The court majority then indicated that it would be "inclined to agree with [Mourning] that a person generally may not be considered a 'supervisor' unless he exercises Section 2(11) authority over an 'employee' as defined by Section 2(3), which expressly excluded any individual employed as a 'supervisor.' " (Footnote omitted.)[14] Proceeding from this premise, the court majority further questioned the Board's factual predicate for its Order. The majority observed that it was not clear whether the Board's decision rested on Mourning's alleged command authority over a crew of several persons, or simply over an occasional pilot with the same rank and authority as Mourning. The court characterized as ambiguous the Administrative Law Judge's finding that Mourning "sometimes commanded at least one subordinate crew member, a copilot," thereby, according to the court, suggesting that he occasionally directed a larger crew. In light of all the foregoing, the majority remanded this proceeding.

In dissenting to the remand, Judge MacKinnon disagreed with the majority's legal view of what constituted supervisory status under the Act, and stated that he would find Mourning a statutory supervisor. Judge MacKinnon argued that Section 2(3) defines "employee" loosely; i.e., to "include"; whereas Section 2(11) defines the word "supervisor" more rigidly; i.e., it "means." He argued that, in the case of a conflict between the two sections, Section 2(11) would give way the least. He noted Section 2(11) indicates supervisors direct "other employees," and he concluded that supervisors are employees for the purposes of Section 2(11), for otherwise the statute could merely have read "supervisors exercise authority over employees" not "supervisors" direct "other employees."

In his statement of position on remand, General Counsel argues that Mourning's crew, when he had one, consisted of a copilot only; that Mourning had no authority responsibly to

[14] *Id.* at 770.

direct the copilot, but, assuming that he did, that the exercise of this authority was too sporadic and routine to classify Mourning a statutory supervisor.[15]

The Charging Party argues that the Board in its earlier decision erroneously failed to distinguished between pilot-in-command authority (which originates from the needs of flight safety, not from labor relations), and the authority responsibly to direct the copilot in the way he performed his duties; that Mourning and other transport pilots were not vested with any supervisory authority and they did not direct the performance of their crews' work when they functioned with a crew; that the facts of the trilogy cases relied on by the Administrative Law Judge were significantly different from the facts in this proceeding; that, even if Mourning's pilot-in-command authority could be equated with authority responsibly to direct, he was not a statutory supervisor because the exercise of any such authority was sporadic and infrequent.[16]

Respondent contends that the Board should reaffirm its original decision. Thus, it asserts that the court's "selective view" of the facts was erroneous, as it was allegedly based on Mourning's discredited testimony; that the court ignored Respondent's credited evidence that Mourning had a crew on postinspection test flights of one or more persons;[17] and that the court erroneously characterized crew members as passengers.[18]

Upon reevaluation of the entire record in this proceeding, we now find merit in the arguments of the General Counsel and the Charging Party and, contrary to the Adminstrative Law Judge, we find first that Mourning was an employee within the meaning of the Act. The Adminstrative Law Judge, in

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[15] General Counsel did not address himself to the legal issue remanded by the court.

[16] Charging Party addressed itself to the legal issue only to the extent it indicated agreement with the court majority view thereon.

[17] See fn. 9 *supra*.

[18] Respondent did not address itself to the legal issue remanded for consideration.

concluding otherwise, relied heavily on the three decisions noted at footnote 11, *supra.* But we find that the facts in this proceeding, as outlined above, are substantially different from the facts in the "trilogy" cases. In those cases, the Board found that the transport pilots were supervisors because they regularly exercised supervisory authority over at least two other crewmen, a copilot and a flight engineer. The record in this proceeding, however, involving events 5 years earlier than the three cases relied on by the Administrative Law Judge, shows that Mourning flew without other crew members the bulk of his worktime. Thus Mourning's log of all flight time since becoming employed by Respondent shows that he flew only 38.2 hours as a pilot-in-command in a plane which required another crew member and that as a transport pilot he flew the great percentage of his time without a crew member present.[19] Accordingly, we find that any supervisory authority Mourning may have exercised in his tenure at Respondent was clearly too sporadic to find him a supervisor under the Act.

Further, even were we to find that Mourning did exercise such supervisory authority for a sufficient period of time that would ordinarily constitute him a supervisor, we would find on the special facts of this case that Mourning nevertheless did not qualify as a statutory supervisor.

As noted *supra,* the court majority also remanded for the Board's consideration in this proceeding Mourning's contention that he and his fellow pilots could not be found to be statutory supervisors because there were no "employees" for them responsibly to direct. The court majority was inclined to agree with Mourning that a person may generally not be considered a supervisor unless he exercises Section 2(11) authority over one who is an employee as defined by Section 2(3) of the Act, which in turn explicity states that supervisors are excluded from the definition "employee." We agree with the court majority's conclusion. We note the critical fact that the only person over

[19] The Administrative Law Judge characterized Mourning's flight time with at least one subordinate crew member on board as "significant." On further review of the record we disagree with that conclusion.

whom Mourning, as pilot, could conceivably have exercised any supervisory authority was his copilot. And yet, transport pilots interchanged roles as pilot and copilot. Thus, Mourning would have supervised no one but his equal, another pilot, who would have been acting at that time as his copilot. If Mourning were found to be a supervisor, so too would all the other transport pilots. Yet, Section 2(11) of the Act limits the definition of supervisor only to those individuals who are given by their employer responsible authority over other "employees." And Section 2(3) of the Act specifically excludes the term "supervisor" from the definition of "employee." With respect to the argument that as Section 2(11)'s definition of "supervisor" calls for that individual to exercise authority over "other employees," and so the term "employee" must be read in its every day sense rather than as defined by Section 2(3), we agree with the court here that the phrase "other employees" refers to other employees of the same, as opposed to another, employer. It does not mean all workers other than the supervisor himself.

Congress excluded supervisors to insure that as agents of management they would not be pressured by divided loyalties and also because employees needed protection from management. But, as the pilots alternated between being "supervisors" and "supervisees," there no continuing conflict of interest of the usual type justifying their exclusion from the Act.

In sum, we find that before it may be claimed that an individual is a supervisor within the meaning of Section 2(11) of the Act it must be shown that the the individual exercises responsible direction, in the interest of his own employer, over that employer's employees who are employees within the meaning of Section 2(3) of the Act. As Mourning supervised no Section 2(3) employees in his tenure at Respondent, we conclude that Mourning was an employee under the Act at the time he was discharged.

We next proceed to the circumstances surrounding Mourning's termination and we conclude that he was unlawfully discharged because of his union activity.[20]

Mourning began his employment at Respondent in December 1965 as a pilot in the business fleet. He had a good work record and progressed from his initial rating as a reserve pilot to transport pilot in January 1967. As noted, he qualified to fly the Jet Commander aircraft in August 1968. Respondent's former director of flight operations, A. G. Heimerdinger, and its supervisor of the business fleet, Orion T. Quinn, who was Mourning's immediate supervisor, respected Mourning as a good and reliable pilot. Heimerdinger recommended a merit increase for Mourning, which was effective October 28, 1968, 18 days before his discharge.

Mourning became interested in organizing a union for the pilots in late 1967. He obtained some union literature from the Airline Pilots Association which he showed to some pilots and mailed other union literature to pilots. On several occasions, he spoke about the Union to his fellow pilots and to Quinn. The latter acknowledged that he received some union literature; that he might have received some from Mourning; that he knew that Mourning was sympathetic to unions; that he was aware of Mourning's union activity; and that Mourning discussed the Union with him and with "every pilot there." Mourning also approached various company officials and spoke to them about the terms and conditions of employment of the pilot group. During one conversation with Heimerdinger in mid-1968, the latter stated that he had heard that Mourning did not like the way he was running the flight department and that if Mourning did not like it he could leave.

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[20] The following facts leading to our finding that Mourning was discharged for his union activity are based on uncontradicted testimony in the record. Since the Administrative Law Judge found Mourning to be a supervisor and not under the Act's protection, he set out none of the facts relevant to determining the legality of his discharge.

The record contains various documents which clearly show that Mourning's union activity was well known to Respondent's high-level officials. Thus, a memo dated May 20, 1968, from Heimerdinger advised Brizendine, Respondent's President, of union activity. Heimerdinger indicated that he has researched the "problem" with the pilots. Another memo, dated June 6, 1968, from W. I. Paine, assistant supervisor of labor relations, to an official of Respondent states that Respondent's investigation showed that Mourning was one of three prime suspects in the advocacy of union representation, and that Heimerdinger would keep Respondent informed of any new developments with respect to union activity. Respondent's general practice at that time was to make every effort to find out what union was interested in its employees, who the organizers were, what the issues were, and to see if Respondent could take some remedial action.

Mourning was discharged on November 15, 1968. After Mourning's discharge, Quinn told Campbell, another pilot, not to worry about Mourning, that if Mourning had not been obnoxious and open about the Union it would not have come to "a head," and that the order to discharge Mourning came "from the top." Quinn also advised Campbell not to get mixed up in the "politics" between the pilots and pilot groups that was going on, but just to do his job, and it would be much better for him in the long run. Quinn admitted that he was trying to steer Campbell clear of the "malcontents." He did not characterize Mourning as a malcontent, but he did classify him as a very unhappy pilot.

With respect to the specifics of Mourning's discharge, on September 30, 1968, Mourning was designated as pilot in command of a Cessna aircraft to perform a chase flight of a DC—9 aircraft at an altitude of 20,000 feet. Shortly before the flight, a veteran transport pilot, Bob Allison, asked Mourning if he could fly the left seat as pilot.[21] Mourning agreed, and

[21] Respondent elicited testimony that a pilot-in-command did not have the authority to "delegate the position of pilot-in-command on that flight to another pilot," except in emergency, but this appears to have played no part in Respondent's reason for letting Mourning go.

Allison was flying the plane as pilot during the entire flight. During the flight, Mourning noticed that the vacuum-operated instruments, which provided the pilot with certain altitude and direction information, were not working. Mourning immediately alerted Allison to the failure, but as they were flying under visual flight rules they were able to complete the flight and return to the ground a half hour later without further incident. Upon returning to Long Beach, Mourning reported the failure of the vacuum pumps to Respondent's maintenance personnel. They examined the plane, found both vacuum pumps damaged, and replaced them.[22] The mechanics also found scorched paint on the engine cowling.[23] At or about the same time, Heimerdinger ordered a complete inspection of the aircraft for other possible damage to the engines and plane structure, but none could be found. Neither Allison nor Mourning was reprimanded at that time. Mourning continued to fly various aircraft for Respondent in the same capacity and on similar flights until he was discharged. The record also shows that within 30 days after Mourning's discharge, the shafts on two vacuum pumps were sheared on a Cessna during separate flights by pilot Campbell. These pumps had to be replaced, but Campbell was not discharged. The record further

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[22] The vacuum pumps cost $100 each.

[23] According to Respondent's supervisor of flight development, John L. Hobbs, who was Respondent's crew chief at the time of the vacuum pump incident, and the one who removed the damaged pumps, scorched paint can only be caused by overheating the engine. He testified that overheating comes about by exceeding the specified cylinder head temperature, but the condition was not necessarily related to the failure of the vacuum pumps. Hobbs also testified that there was no way to know whether the failure of a vacuum pump was due to overspeeding or overboosting engine. It was because of the loss of the vacuum pumps that Respondent eventually told Mourning it was letting him go. See *infra*. Hobbs further testified that the engines on the plane in question were equipped with governors to keep them from overspeeding. Overboosting was described by Hobbs as exceeding the specified manifold pressure, but Mourning had assured Hobbs that he had not overboosted the engines. Hobbs indicated that scorched cowling would probably be noticed at the time of the daily preflight inspection but he did not know if the paint on the cowling had been scorched before Mourning's flight, as he did not always perform the preflight inspection.

shows Respondent knew that other pilots had blown out tires upon landing on five occasions; had flown into power lines; and had collided with fixed objects on the ground causing damage, but none of them was discharged for such incidents.

On November 14, 1968, Heimerdinger and Kent met with Mourning and told him that he was going to be discharged the next day. Kent mentioned that the loss of the vacuum pumps on September 30 was "a matter of safety or possibly a matter of misoperation of the aircraft which involved safety considerations." Heimerdinger testified that he made the decision to discharge Mourning for a number of matters that had accumulated. However, he did not list these reasons for Mourning; but he did tell him of the vacuum pumps.[24]

From the foregoing, it is clear that Respondent had knowledge of Mourning's union activity and that it was concerned about the pilots interest in union representation. Thus, as we have noted above, several high level officials were kept informed of and knew that Mourning was a prime suspect in union activity. In addition, during the time that Mourning allegedly used bad judgment, he was given a pay increase just before his discharge. Furthermore, although Heimerdinger was allegedly concerned with Mourning's other deficiencies, he was not reprimanded nor were such matters mentioned to him when

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[24] Heimerdinger's other reasons were allegedly based on his own observation of Mourning's excessive speed in taxiing, 6 to 8 months before the discharge. In addition, a Mr. Patton, from flight operations, who was not called as a witness, reported to Heimerdinger that Mourning checked the magnetos while taxiing the aircraft, contrary to company policy. On another occasion, employee Gerry Pearson, also not called as a witness, reported to Heimerdinger that in 1967 Mourning did not adhere to "instructions" and was taxiing at high speeds at a nearby Naval Air Station. At another time Heimerdinger also received a report that Mourning flew "at an altitude that probably he shouldn't have." Heimerdinger recalled that the only time he reprimanded Mourning was for doing "taxi magneto checks going down the runway." Heimerdinger as noted *supra*, did not relate any of the above reasons to Mourning at the time of discharge and he was never reprimanded about them. Heimerdinger did admit that the above "problems" are "common" and that they happen to all pilots. We also note that overspeeding, overboosting, and/or overheating were not relied on as reasons for discharging Mourning.

he was discharged. And while other pilots were involved in several serious incidents where damage to planes and property resulted, none were discharged. In these circumstances, we conclude that Respondent merely seized upon the vacuum-pump incident as a pretext for discharging Mourning and that such conduct was designed to discourage its employees' union activity. Accordingly, we find that Mourning was discharged in violation of Section 8(a)(3) and (1) of the Act.[25]

We also find that Quinn's remark to Campbell was a warning to him not to get involved in the discussion between the pilots and pilot groups, and that this comment interfered with the employees' union activity and was a violation of Section 8(a)(1) of the Act.[26]

The Remedy

Having found that Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act we shall order that it cease and desist therefrom.

We additionally shall order Respondent to offer Robert H. Mourning reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered by reasons of the discrimination against him. Backpay shall be computed on a quarterly basis, making deductions for interim

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[25] As we have found that Mourning was not a supervisor at the time of his discharge we also find no merit in Respondent's argument that he was a supervisor trainee and he ultimately would have become a supervisor. There is evidence in this record that Mourning was attending ground school to prepare himself to fly larger aircraft, but there is no evidence that the program was designed to train pilots to become supervisors. Furthermore, before Mourning could expect assignment as a pilot-in-command on larger aircraft such assignment was contingent upon his demonstrating his qualifications therefor. Under the circumstances of this case it would be pure speculation whether he would have ultimately attained supervisor status.

[26] As the Administrative Law Judge found Campbell shared Mourning's status as a supervisor, he did not pass on the Sec. 8(a)(1) allegations of Quinn and Campbell's discussion.

earnings, and with interest to be paid on the amount owing to be computed in the manner prescribed in *F. W. Woolworth Company,* 90 NLRB 289 (1950), and *Florida Steel Corporation,* 231 NLRB No. 117 (1977); see, generally, *Isis Plumbing & Heating Co.,* 138 NLRB 716 (1962), enforcement denied on other grounds, 322 F.2d 913 (C.A. 9, 1963).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in and affecting commerce within Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Robert H. Mourning because of his union activity, Respondent has violated Section 8(a)(3) and (1) of the Act.

4. By advising employees not to get mixed up in union activity, Respondent has interfered with, restrained, and coerced employees in the exercise of their rights guaranteed them under Section 7 of the Act, and has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

5. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Douglas Aircraft Company, a Component of McDonnell Douglas Corporation, Long Beach, California, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discouraging membership in the Air Line Pilots Association, or any other labor organization of its employees, by discriminating against them in regard to their hire and tenure of employment.

(b) Discharging, refusing to employ, laying off, or otherwise discriminating against employees because of their union activities.

(c) Advising employees not to get mixed up in union activity or otherwise interfering with, restraining, or coercing employees in the exercise of their rights guaranteed them under Section 7 of the Act to engage in organization or other protected concerted activity.

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer to Robert H. Mourning immediate and full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay suffered as a result of his unlawful discharge with interest thereon to be computed in the manner prescribed in The Remedy.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Long Beach, California, place of business copies of the attached notice marked "Appendix."[27] Copies of said notice on forms provided by the Regional Director for Region 31, after being duly signed by an authorized Representative of Respondent, shall be posted by it immediately

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[27] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C. September 29, 1978

John H. Fanning, Chairman

John A. Panello, Member

John C. Truesdale, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT discharge or interfere with, restrain, or coerce employees in regard to hire or tenure of employment, or any term or condition of employment because of their protected concerted activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the Act except to the extent that such rights may be affected by lawful agreements in accordance with Section 8(a)(3) of the Act.

WE WILL offer to Robert H. Mourning immediate and full reinstatement to his former position, or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights previously enjoyed, and make him whole for any loss of pay, with interest, or other benefits suffered by reason of the discrimination against him.

DOUGLAS AIRCRAFT COMPANY,
A COMPONENT OF McDONNELL
DOUGLAS CORPORATION
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building—Room 12100, 11000 Wilshire Boulevard, Los Angeles, California 90024, Telephone (213) 824-7357.

Opposition

Office - Supreme Court, U.S.
FILED
FEB 23 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1262

In the Supreme Court of the United States

OCTOBER TERM, 1981

MCDONNELL DOUGLAS CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND
ROBERT H. MOURNING

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Board properly concluded that Robert Mourning was an employee and not a supervisor within the meaning of Section 2(11) of the National Labor Relations Act.

2. Whether the Board acted properly in finding, on the basis of substantial evidence, that Mourning was discharged in violation of Section 8(a)(3) and (1) of the Act, without remanding the case to the administrative law judge for a specific credibility determination.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-1 to A1-12) is reported at 655 F.2d 932. The initial decision of the National Labor Relations Board (Pet. App. A2-1 to A2-7) is reported at 221 N.L.R.B. 1180. The Board's supplemental decision and order (Pet. App. A3-1 to A3-17) is reported at 238 N.L.R.B. 668.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 1981. A petition for rehearing was denied on November 12, 1981. The petition for a writ of certiorari was filed on January 5, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The pertinent part of Section 2 of the National Labor Relations Act, 29 U.S.C. 152, is set forth at Pet. 2. Section 8(a) of the National Labor Relations Act, 29 U.S.C. 158(a), provides in relevant part:

> It shall be an unfair labor practice for an employer—
>
> > (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
> >
> > * * * * *
> >
> > (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

STATEMENT

1. Petitioner is an aircraft manufacturer that, between 1966 and 1969, employed approximately 50 to 55 pilots in its flight operations department, including five "transport pilots" (Pet. App. A2-3, A3-2). The primary function of a transport pilot was to fly company executives and flight crews, customer representatives, other individuals and cargo between petitioner's facilities in southern California and, occasionally, to facilities in other states (*id.* at A2-3 to A2-4, A3-3). The transport pilots also flew "chase" mis-

sions (in which one aircraft followed an experimental plane being tested), photo missions, test flights and instructional flights for new company pilots (*id.* at A2-4, A3-3).

Robert Mourning was employed by petitioner as a transport pilot from 1965 until his discharge in November 1968 (Pet. App. A2-3, A3-3). On the vast majority of his transport flights, Mourning was the sole pilot. On approximately 5% of his flights as pilot-in-command, Mourning had a copilot. On another 5% of his flights, he was accompanied by a pilot trainee. Otherwise, Mourning flew without a crew (*id.* at A2-4, A3-3 to A3-4). In those instances when transport pilots flew with copilots, the copilots were fully qualified pilots who served as pilots-in-command on other flights. The pilots-in-command and copilot each performed technical functions designated for them on checklists prepared in advance of the flight (*id.* at A3-3 to A3-4).

In late 1967, Mourning became interested in organizing a union for the pilots employed by the petitioner. Thereafter, Mourning talked with his fellow pilots about obtaining union representation and mailed them literature from the Airline Pilots Association ("the Union"). He also spoke about the Union to his supervisor, Orion Quinn, who was aware of Mourning's union sympathies and his contacts with the other pilots. In addition, Mourning approached various company officials to talk about the pilots' terms and conditions of employment. At a meeting in mid-1968, A.G. Heimerdinger, petitioner's director of flight operations, told Mourning that if he did not like the way the company was being run he could leave (Pet. App. A3-10). In May 1968, Heimerdinger sent a memo to the company president advising him

that the pilots were organizing. Another memo in June 1968, from petitioner's supervisor of labor relations, identified Mourning as one of three pilots suspected of being union advocates (*id.* at A3-11).

Mourning was discharged on November 15, 1968, allegedly for causing the failure of two vacuum pumps during a chase flight on September 30—an incident described by a company official as "a matter of misoperation of the aircraft which involved safety considerations" (Pet. App. A3-13). Mourning was designated the pilot-in-command of the September 30 flight, but the copilot had actually operated the plane during the entire flight. During the flight, Mourning noticed that the two vacuum pumps, which provide power for the panel instruments, had failed and alerted the pilot operating the plane of this failure. The flight was completed without further incident and Mourning reported the failure of the vacuum pumps to petitioner's maintenance personnel. When the vacuum pumps were subsequently replaced, mechanics working on the plane also found scorched paint on the engine cowling, suggesting overheating. A complete inspection of the plane was ordered by Heimerdinger, but no other damage was found. Neither Mourning nor the other pilot on the flight was reprimanded at the time (*id.* at A3-11 to A3-13).

Following Mourning's discharge, supervisor Quinn told transport pilot Malcolm Campbell, a friend of Mourning's, that if Mourning had not been so open about his union activities he would not have been fired and that the order to discharge Mourning had come "from the top." Quinn also advised Campbell that if he did not get involved in the "politics" involving pilots and pilot groups and just did his job, he would be better off in the long run (Pet. App. A3-11).

2. Following the issuance of a complaint based upon a charge filed by Mourning, which alleged that he was discharged in violation of Section 8(a)(3) and (1) of the Act, a hearing was held before an administrative law judge.[1] The administrative law judge issued a decision in which he found that Mourning was a supervisor within the meaning of the Act, and that therefore his discharge, even if motivated by union considerations, did not violate the Act (Pet. App. A2-2 to A2-7). The Board adopted the findings and conclusions of the administrative law judge and dismissed the complaint (Pet. App. A2-1). Following an appeal by Mourning, the case was remanded to the Board (*Mourning* v. *NLRB*, 559 F.2d 768 (D.C. Cir. 1977)). In its opinion, the court directed the Board to consider whether an individual is a supervisor under Section 2(11) of the Act if it is found that he exercises supervisory authority only over individuals who are themselves excluded from the definition of employees under Section 2(3) of the Act. The court also directed the Board to determine whether Mourning's crew ever consisted of persons who were "employees" within Section 2(3) of the Act or were merely pilots like himself, and, if his crew was composed of employees, whether the authority he exercised over the employees was too sporadic or routine to warrant classifying him as a supervisor under the Act (Pet. App. A3-1 to A3-2).

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[1] The complaint was originally dismissed by the Board on procedural grounds in a decision reported at 202 N.L.R.B. 305 (1973). The Board's dismissal was reversed in *Mourning* v. *NLRB*, 505 F.2d 421 (D.C. Cir. 1974), and the Board subsequently directed that a hearing be held on the issues raised by the complaint (Pet. App. A2-2).

On remand, the Board issued a supplemental decision and order in which it concluded that Mourning was an employee, and not a supervisor (Pet. App. A3-1 to A3-18). Noting that Mourning flew most of his transport flights without other crew members, the Board found that any exercise of supervisory authority by Mourning was too sporadic to render him a supervisor under the Act. With regard to the question of statutory interpretation raised by the court of appeals, the Board concluded that to qualify as a supervisor under Section 2(11) of the Act, an individual must exercise supervisory authority over individuals employed by the same employer who are employees within the meaning of Section 2(3). Accordingly, the Board found "on the special facts of this case" that Mourning would not qualify as a supervisor even if he had exercised more than sporadic supervisory authority, since the only individuals he supervised—fellow transport pilots serving as copilots, who alternated as pilots-in-command on other flights—would also be considered supervisors, and thus were not Section 2(3) "employees" (Pet. App. A3-8 to A3-9).

Having found Mourning to be an employee under the Act, the Board proceeded to consider the circumstances surrounding his discharge. It concluded that petitioner's asserted reason for the termination was a pretext and that Mourning was discharged because of his union activity, in violation of Section 8(a)(3) and (1) (Pet. App. A3-10 to A3-14).[2] The Board ordered petitioner to cease and desist from the unlaw-

[2] The Board also found that Supervisor Quinn's warning to transport pilot Campbell not to get involved in union activity constituted an independent violation of Section 8(a)(1) (Pet. App. A3-14).

ful conduct found, and to reinstate Mourning with backpay (Pet. App. A3-15 to A3-17).

3. The court of appeals upheld the Board's supplemental decision and enforced its order (Pet. App. A1-1 to A1-12). The court agreed with the Board that any supervisory authority exercised by Mourning was too sporadic to support a finding that he was a supervisor, and also affirmed the Board's alternative holding that Mourning could not be a supervisor under the Act because he did not exercise authority over any "employees" within the meaning of Section 2(3) (Pet. App. A1-7 to A1-11). Finally, the court concluded that substantial evidence supported the Board's finding that Mourning was unlawfully discharged because of his union activity (Pet. App. A1-11 to A1-12).

ARGUMENT

1. Petitioner challenges (Pet. 6-7, 9-17) the propriety of the Board's ruling, upheld by the court of appeals, that an individual is not a "supervisor" under Section 2(11) of the Act, unless he exercises supervisory authority over others who are "employees" within the meaning of Section 2(3). Petitioner asserts that this holding is contrary to the purpose of the supervisory exemption to the Act, as well as the relevant legislative history, and conflicts with decisions of this Court. However, it is not necessary for this Court to reach this issue of statutory construction, since the Board found, in the alternative, that any exercise of supervisory authority by Mourning was too sporadic to support a finding that he was a supervisor under the Act. This determination is supported by the record evidence, is in accordance with well settled legal principles, and does not raise an issue warranting this Court's review.

Evidence adduced at the unfair labor practice hearing established that Mourning flew the vast majority of his flights as the sole pilot, without any accompanying crew members (Pet. App. A2-4, A3-3 to A3-4; Tr. 16, 20-22, 24, 57-60, 216-217).[3] Thus, Mourning testified that he flew with a copilot only 5% of the time (Pet. App. A3-3 to A3-4; Tr. 59).[4] In addition, Mourning testified that he was accompanied by a newly hired pilot-trainee on another 5% of his flights (Pet. App. A3-4; Tr. 57-59). However, the record establishes that pilot-trainees did not serve as crew members on instructional flights, that Mourning played no effective role in determining their future employment status, and that his relationship to such trainees was limited to instruction, familiarization with the aircraft, or checking qualifications (Pet. App. A3-4; Tr. 22-23, 166-167, 210-211, 215-

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[3] "Tr." refers to the transcript of the unfair labor practice hearing before the administrative law judge.

[4] Petitioner challenges this estimate (Pet. 18-20), which was based on the total time spent by Mourning in its employ, asserting that it was probable that he flew with a copilot 30% of the time during the final three months of his employment. Petitioner relies on evidence showing that, during the final three months, Mourning flew 38.2 hours as a pilot in command of a Jet Commander, a plane which he had just been "rated" as qualified to pilot and which required a copilot under federal regulations. However, the fact that transportation pilots average 30 to 40 hours of flight time a month does not establish that Mourning's total flight time was the same. Moreover, even if petitioner's estimate of 30% is accurate, there is no showing that this increased amount of flying with a copilot represented a permanent change in the nature of Mourning's duties, rather than a short-term aberration designed to enable a newly-rated pilot to gain greater experience and proficiency with the plane.

217).[5] Accordingly, it is clear that the copilots who flew with Mourning on a small percentage of his flights were the only crew members over whom he may conceivably have exercised supervisory authority.[6]

It is well settled that infrequent or sporadic performance of supervisory duties is insufficient to make an employee a statutory supervisor. See *Plastic Workers Union, Local 18* v. *NLRB*, 369 F.2d 226, 230 (7th Cir. 1966); *Illinois State Journal-Register, Inc.* v. *NLRB*, 412 F.2d 37, 44 (7th Cir. 1969); *NLRB* v. *Security Guard Service, Inc.*, 384 F.2d 143, 149-151 (5th Cir. 1967); *NLRB* v. *Lindsay Newspapers, Inc.*, 315 F.2d 709, 712 (5th Cir. 1963); *NLRB* v. *Swift & Co.*, 292 F.2d 561, 563 (1st Cir. 1961); *NLRB* v. *Cousins Associates, Inc.*, 283 F.2d 242, 243-244 (2d Cir. 1960).

The cases relied upon by petitioner (Pet. 20-21), holding that it is the existence of supervisory au-

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[5] The Board has consistently held that the relationship of an instructor to a trainee is not the same as that of a supervisor to an employee, and thus does not deprive the instructor of the protections of the Act. See *Rub-R Engraving Co.*, 89 N.L.R.B. 475 (1950); *Petroleum Helicopters, Inc.*, 184 N.L.R.B. 60 (1970); *Ball Plastics Division*, 228 N.L.R.B. 633 (1977).

[6] Petitioner attacks (Pet. 10 n.7) the Board's finding, upheld by the court of appeals, that Mourning only supervised copilots, asserting that a mechanic and an engineer, as well as a copilot, were sometimes aboard flights flown by transport pilots. However, there is no evidence that Mourning ever had such individuals on any flight under his command. The only evidence of nonpilots traveling in a plane commanded by Mourning relates to individuals who, whatever their ordinary occupations, were there merely as passengers (Pet. App. A3-4 & n.10; Tr. 24, 59-61, 217). Such individuals were not crew members and, as passengers, performed no functions relating to operation of the aircraft.

thority and not the frequency of its exercise which is relevant in determining supervisory status, are inapposite. They deal with a situation where an individual regularly occupies a supervisory position and is able to exercise supervisory authority, but only exercises such authority on an occasional or infrequent basis. Where, as here, an individual only occasionally occupies a position which entitles him to exercise supervisory authority, the case law establishes that the individual will not be found to be a supervisor on the basis of sporadic performance of supervisory functions.

2. The Board's alternative holding that, even if Mourning occasionally exercised supervisory authority, he was not a supervisor within the meaning of Section 2(11) of the Act because he did not exercise that authority over any statutory "employee," constitutes a reasonable interpretation of the Act. Moreover, this ruling does not conflict with any decision of this Court or any court of appeals.

Section 2(11) limits the definition of supervisor to those individuals who are given by their employer responsible authority over "other employees." And Section 2(3) of the Act specifically excludes "supervisors" from the definition of "employee." Accordingly, it follows that a person cannot be a supervisor for purposes of the Act unless he supervises individuals who are "employees" within the meaning of Section 2(3). Since the only person over whom Mourning, as pilot, could conceivably have exercised any supervisory authority was his copilot, who was his equal because the roles of copilot and pilot were interchangeable,[7] the Board reasonably concluded that

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[7] Petitioner takes issue (Pet. 10 n.7) with the Board's factual finding that transport pilots exchanged roles as pilot

"Mourning supervised no Section 2(3) employees in his tenure" with petitioner and hence was "an employee under the Act at the time he was discharged" (Pet. App. A3-9).

The Board's conclusion that Mourning and his fellow transport pilots were employees, and not supervisors, does not contravene the policy underlying the exclusion of supervisors from the protection of the Act—*i.e.*, the avoidance of conflicts between the duty to exercise supervisory authority over employees and the allegiances owed to a bargaining representative. As the court of appeals observed, "[n]o such representational conflict occurs when one pilot deals with another pilot whose relationship to management is exactly the same as his own" (Pet. App. A1-9).

Contrary to petitioner's contention (Pet. 6-7, 9, 16-17), the Board's interpretation of Section 2(11) of the Act in this case does not conflict with this Court's decision in *NLRB* v. *Yeshiva University*, 444 U.S. 672 (1980). In *Yeshiva*, the Court held that the University's full-time faculty members were managerial employees excluded from the Act's coverage. The Court found that the faculty members "exercise authority which in any other context unquestionably would be managerial," [8] and rejected the argument

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and copilot, claiming that the record shows that copilots of Jet Commanders were not always qualified to serve as pilots-in-command. However, the evidence relied upon by petitioner (Tr. 62-63) established only that Mourning flew as copilot in a Jet Commander before he was "rated" as qualified to fly that type of plane as pilot in command. In any event, there is no dispute that all copilots were rated as qualified to command some of the aircraft in petitioner's transport fleet, which they sometimes did with a copilot aboard.

[8] Thus, the Court found that, "[t]o the extent the industrial analogy applies, the faculty determines * * * the product

that their authority could not be classified as managerial merely because they exercise independent professional judgment. *Id.* at 686. In the instant case, petitioner has never contended that Mourning was a managerial employee or presented any evidence indicating that he exercised managerial authority.

Nor is there any merit to petitioner's assertion (Pet. 7, 11-12) that the Board's statutory interpretation in this case is inconsistent with this Court's decision in *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177 (1941). In that case, the Court held that the Board's broad remedial authority under Section 10(c) of the Act, 29 U.S.C. 160(c), permitted it to order the reinstatement of strikers who were unlawfully denied reemployment and who had subsequently obtained substantially equivalent employment. The Court found that the remedial purposes of the Act would be effectuated by reinstating such strikers even though, having obtained other employment, they were no longer within the Section 2(3) definition of "employee." As the court below properly concluded, "[n]o such policy reasons exist in the present case to overcome the usual presumption that the plain words of § 2 mean what they say" (Pet. App. A1-8).

3. Petitioner contends (Pet. 7-9, 21-28) that the Board acted improperly in deciding that Mourning was discharged because of his union activity without first remanding the case to the administrative law judge for the resolution of alleged credibility conflicts. There is no merit to this contention.

Petitioner relies (Pet. 23-24) on Heimerdinger's self-serving testimony (Tr. 405-406, 420) concerning his motivation for the discharge of Mourning to sup-

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to be produced, the terms upon which it will be offered, and the customers who will be served" (444 U.S. at 686).

port its claim that the Board failed to make necessary credibility resolutions and ignored relevant evidence on the issue of the motive for the discharge. However, it is clear the Board implicitly rejected this conclusory testimony, which was overwhelmed by record evidence indicating that Mourning was discharged because of his union activities (see pages 3-4, *supra*). In these circumstances, the Board's failure to make specific credibility determinations was not improper, and is clearly not an issue which warrants further review. In any event, since petitioner never raised this issue before the Board, it is precluded from doing so here. See Section 10(e) of the Act; *NLRB* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318, 322 (1961).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Intervenor's Brief

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No. 81-1262

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

McDONNELL DOUGLAS CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

ROBERT H. MOURNING,
Intervenor.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INTERVENOR'S BRIEF IN OPPOSITION

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No. 81-1262

IN THE
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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INTERVENOR'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner, one of the nation's largest manufacturers of aircraft, maintained at all material times a fleet of small airplanes -- called the "business fleet" -- which it used to transport executives, government officials, and military officers on business errands between various Company facilities (Tr. 27-28, 194, 337-38, 369).[1/]

1/ "Tr." references are to the transcript of the hearing before the Administrative Law Judge.

Robert H. Mourning was one of the five or six pilots who regularly operated these small airplanes.

In June 1968, Company officials learned that a union organizing effort seemed imminent among its pilots and, in searching for a ringleader, concluded that Mourning was one of the "prime suspects" A. 3, p. 11.[2/] After Mourning mentioned the benefits of union representation to his own supervisor, Tr. 37-39, he was immediately discharged in November 1968. In the weeks that followed, Mourning's former supervisor repeatedly approached Mourning's friend, pilot Malcolm Campbell, and warned Campbell not to emulate Mourning's behavior; in addition, Campbell was asked to tell the Company of any legitimate reasons he could recall which belatedly "would justify" Mourning's discharge (A. 3, pp. 11, 14; Tr. 197).

Mourning filed a timely charge with the Board. At the unfair labor practice hearing which eventually

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2/ "A" references are to the decisions of the National Labor Relations Board, and the Court of Appeals, reprinted in the Appendix to the Petition.

ensued,[3/] the Company contended that Mourning was a "supervisor" within the meaning of the National Labor Relations Act, 29 U.S.C. § 152(11), and relied, in support of that new contention, upon a series of Board representation case decisions which had issued in 1973 after Mourning's discharge.

The undisputed evidence introduced at the hearing showed that Mourning had never hired, fired, promoted, demoted, laid off or recalled, disciplined or assigned work to any other person, or resolved their grievances; nor was he ever told by the Company that he had authority to recommend or effectuate such action (Tr. 22-23). He always wore the "long" badge which the Company gave to its non-supervisory hourly and salaried employees; and never received the "short" badge which the Company awarded to those who were promoted to, or hired for, a supervisory position (Tr. 25, 215-16, 338). No

3/ Litigation of the merits was delayed. The Board's General Counsel initially declined to issue a complaint until, after newly discovered evidence was presented, he decided to do so in 1972. Thereafter, upon an interlocutory appeal by the Company, the Board held that its General Counsel was barred from prosecuting the case because of procedural considerations; however, on Mourning's petition for review, the U.S. Court of Appeals for the District of Columbia reversed the Board decision and remanded for a hearing. Mourning v. NLRB, 505 F.2d 421 (D.C. Cir. 1974).

evidence was introduced to suggest that he ever attended any management meetings, or received any Company training in preparation for managerial functions.

Like the other pilots who operated the business fleet airplanes, Mourning did not select the missions he flew, or the aircraft to be used in these missions; nor was he responsible for preparing and filing the flight plans required (Tr. 82, 221-22), or attending to aircraft maintenance and repair, or for assuring that the assigned aircraft were fueled, available and airworthy (Tr. 96, 381).

The undisputed evidence also showed that most of the flights Mourning piloted were for the purpose of shuttling Company executives, customers or flight crews among various Company facilities on flights typically shorter than 40 minutes in duration (R. 29, p. 3; R. 19, p. 2; Tr. 15-16).[4/] There was no evidence that Mourning ever made any lengthy trips where any interim arrangements for crew disposition, relief or housing would be necessary (Tr. 246, 247, 378-381).

4/ "R." references are to the record filed by the Board with the Court of Appeals. Each such reference uses the item number appearing on the Board's record index.

During his tenure as a Company pilot, over 95% of Mourning's flight time was spent operating airplanes which, under federal regulations, required a total crew of only one pilot (R. 29, pp. 3-4; R. 19, p. 3; G. C. Exhibit 3; Tr. 21-22, 57-60, 66-67). On those unusual occasions when Mourning did operate a flight with another crewmember on board, the only other crewmember was a co-pilot, and Mourning did not direct him in the performance of his duties (R. 29, p. 4; Tr. 23-25, 256-57). The allocation of functions as between pilot and copilot was not determined by the pilot, or during the course of flight; it was permanently established by the terms of federal regulation, by the applicable aircraft's check list, and by Company policy (R. 29, p. 53; Tr. 151-155).

Moreover, any of the business fleet pilots might be selected by the Company to serve either as pilot or co-pilot on any given flight, depending upon a variety of circumstances (R. 29, p. 6; Tr. 112-13, 159, 207-209, 234-36, 238-39, 296, 332-33, 357-58, 371). Whoever was assigned to function as the pilot in command on any given flight was authorized by federal regulations to override or alter any other crewmember's performance which, during flight, jeopardized safety. But neither

the regulations nor Company policy authorized any pilot to evaluate other crewmembers' proficiency, assign them any duties, issue any reprimands, effect any discipline, resolve any grievances, or exercise any other form of management authority over them (R. 29, p. 4; Tr. 24, 154-55, 216-18, 223-27).

Nonetheless, the ALJ concluded that Mourning had "authority, in the interest of the employer . . . responsibly to direct . . . other employees . . .", within the meaning of § 2(11) of the Act. In the ALJ's view, the trilogy of 1973 Board representation cases cited by the Company had established that all airplane pilots who "serve some of their time as captains", are necessarily supervisors because they all have authority "responsibly to direct" other employees. A. 2, pp. 4-6. On December 16, 1975, the Board, without any accompanying explanation, adopted the ALJ's order and dismissed the complaint. Thereafter, Mourning again invoked his judicial remedy and, on May 13, 1977, the U.S. Court of Appeals for the District of Columbia Circuit again ordered further proceedings before the Board. Robert H. Mourning v. NLRB and McDonnell Douglas Corp., 559 F.2d 768 (D.C. Cir. 1977).

The District of Columbia Court "question[ed] the factual predicate for the Board's Order", 559 F.2d at 770, noting that the ALJ's decision was ambiguous with respect to the number and rank of the persons Mourning was said to supervise. If a person cannot be a supervisor within the meaning of the Act unless he exercises § 2(11) authority over an "employee" as defined by § 2 (3), the Court noted, that fact alone might well preclude a finding that Mourning was a supervisor. Accordingly, the District of Columbia Court remanded for clarification of the identity and number of the persons in Mourning's crews and the nature of the authority he exercised over them; and for resolution of the question of statutory interpretation identified by the Court.

The Board again decided to accept the remand. The Company, the General Counsel, and Mourning all submitted statements of position (R. 25, 26, 27, 28), none of which requested the Board to conduct additional evidentiary proceedings on the issues posed by the remand. Both the General Counsel and Mourning argued that Mourning's pilot authority over his copilot did not constitute true supervisory authority within the meaning of the Act; that the ALJ and the Board had erred in

the earlier phase of the proceedings, in failing to recognize that the 1973 trilogy was factually distinguishable; and that any supervisory authority which Mourning might arguably have exercised was, in any event, too sporadic and infrequent to deprive him of employee status. Upon reevaluation of the entire record in light of the remand, the Board found merit in these arguments (A. 3, p. 7).

The Board also resolved the statutory interpretation question raised by the Court. A true supervisor, the Board held, must exercise his authority over persons who are employees within the meaning of § 2(3). On "the special facts of this case" (R. 29, p. 9), the Board held, that rule provided an additional basis for its determination that Mourning was not a supervisor. A. 3, p. 8. Thus, the only person over whom Mourning could conceivably have exercised supervisory authority was his copilot. Yet the record made it clear that Mourning and his fellow pilots in the business fleet regularly interchanged roles as pilot and copilot. Therefore, if Mourning were characterized as a supervisor, all of the other pilots were also supervisors and none of them would have any employees to supervise.

After reviewing Mourning's employment history, the Board found that he had been discharged in violation of § 8(a)(3) and (1) of the Act. The Board noted that Mourning had a good work record, that the Company was aware of his unionization efforts, that he was subjected to highly unusual and disparate treatment, that he received a pay increase shortly before his discharge, and that the Company engaged in conversations with Campbell after Mourning's discharge indicating that the real reason for Mourning's discharge was his union activity. Since all of the foregoing, and more, was established by "uncontradicted testimony in the record," A. 3, p. 10, n. 20, the Board declined to credit the testimony of the Company's former director of flight operations, A. G. Heimerdinger, who asserted that he had discharged Mourning for other, legitimate, reasons (Tr. 385-388).[5/]

The Court of Appeals for the Ninth Circuit denied the Company's petition for review, and granted enforcement of the Board's Order.

5/ Heimerdinger's testimony was contradicted, in any event, by the testimony of another Company official who admitted, at the Board hearing, that, in his view, Mourning was fired because of his union activity (Tr. 366-69).

The Court rejected the Company's contention that the Board had reached a result contrary to that established in its 1973 trilogy, and concluded that the instant case was distinguishable. Unlike the trilogy pilots, the Court noted, Mourning usually flew without any crew; and even when he had a crew, it consisted solely of a co-pilot over whom Mourning had only that safety authority which is "an intrinsic part of any pilot's job" and does not, taken alone, prove that he was a supervisor. A. 1, p. 10. Moreover, since Mourning flew with a copilot "only about 5% of his overall flight time", any authority he exercised over a copilot would be "too sporadic to permit a finding that he was a supervisor" even if the authority were deemed supervisory in nature. Id.

The Court also agreed with the Board's alternative ruling, i.e., that Mourning could not be a supervisor because the Act requires a supervisor to exercise his authority, directly or indirectly, over "other employees". As the Court pointed out, if this quoted phrase were given the meaning sought by the Company, that would not only make Mourning a supervisor but would also make all of the other business fleet pilots supervisors, and leave them all, on the special facts of this case,

without any employees to supervise. Since § 2(11) defines a supervisor as one who exercises authority over "employees", accepting the Company's definition would thus create a "logical impossibility". A. 1, p. 7.

With respect to the question of Company motivation for Mourning's discharge, the Court found substantial evidence in the record supporting the Board's conclusion that union activity was the moving cause and that the Company's contrary testimony was merely pretextual. A. 1, p. 11. The Company's claim that the Board was obliged to remand to the ALJ for express credibility findings was rejected, both because the Company "never clearly asked the Board for this relief" and because, on the instant record, there was "no need to remand for credibility findings . . . The Board found sufficient facts established by uncontradicted testimony . . . [so that] the Board was free to draw its own inferences from the record." A. 1, p. 12.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Court of Appeals' decision that Mourning was not a supervisor is in conflict with no other decision.

The Petition (pp. 6, 9-18) asserts that the Court of Appeals' decision is in conflict with NLRB v. Yeshiva University, 444 U.S. 672, 100 S.Ct. 856 (1980) and Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 191 (1941). This assertion rests upon a mistaken reading, both of the instant case and the cited cases.

In Yeshiva, this Court held that the University's full-time faculty members were managerial employees excluded from the Act's coverage. In the Court's view, the "controlling consideration" was that the faculty members exercised "authority which in any other context unquestionably would be managerial . . . To the extent the industrial analogy applies, the faculty determines . . . the product to be produced [i.e., what courses will be offered], the terms upon which it will be offered [i.e., teaching methods, grading policies, and matriculation standards], and the customers who will be served [i.e., which students will be admitted and retained, and the tuition to be charged]." 444 U.S. at ——,

100 S.Ct. at 864. In the instant case, no evidence was introduced to suggest that Mourning was ever authorized to perform any such managerial functions, and the Company never contended that he was a managerial employee.[6/]

Indeed, the Court's opinion in Yeshiva expressly anticipates and rejects Petitioner's present effort at a more expansive reading of that case:

> "We certainly are not suggesting an application of the managerial exclusion that would sweep all professionals outside the Act in derogation of Congress' expressed intent to protect them. The Board has recognized that employees whose decision-making is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage even if union membership arguably may involve some divided loyalty. Only if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management. We think these decisions accurately capture the intent of Congress . . . " 7/ 444 U.S. at ——, 100 S.Ct. at 866.

6/ Unlike supervisors, who are required by the terms of § 2(11) to exercise certain authority over "employees", managerial employees are excluded from the Act's coverage solely by virtue of the inherent nature of their tasks. See NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974).

7/ In a footnote at this point, the Court cited, among other cases, Doctor's Hospital of Modesto, Inc., 183 NLRB 950, 951-52 (1970), enf'd, 489 F.2d 772 (CA 9, 1973), which was also relied upon here by the Court of Appeals for the proposition that Mourning's routine professional responsibilities did not, of themselves, prove supervisory status. A. 1, p. 10.

Petitioner's characterization of the Court of Appeals' decision is similarly distorted. Contrary to the Petition (pp. 6, 9, 11, et seq.), the Court of Appeals did not find that Mourning was a supervisor, who nevertheless must be afforded the protections of the Act for reasons of perceived policy. Rather, the Court of Appeals and the Board found that Mourning was not a supervisor because (1) the only authority he exercised was "the authority needed to insure the safety of the airplane, passengers, and crew . . . an intrinsic part of any pilot's job." (A. 1, p. 10) and (2) because that authority, even if it were deemed supervisory, was exercised too infrequently to affect his status significantly, and (3) because adopting the Company's statutory interpretation argument would create a "logical dilemma" (A. 1, p. 8) and produce an absurd result.

All three aspects of the Court of Appeals'

rationale are supported by ample precedent,[8] and are not the subjects of any conflicting decisions. Since both the Board, and the Court of Appeals, agreed that the

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8/ Cases holding that an employee who has authority to take immediate action in the interests of safety, or in the face of an emergency, is not necessarily a supervisor include Exxon Pipeline Co. v. NLRB, 596 F.2d 704, 706 (5th Cir. 1979); NLRB v. Eugene Good Samaritan Center, 477 F.2d 297, 300 (9th Cir. 1973) (per curiam); Global Marine Development v. NLRB, 528 F.2d 92, 94 (9th Cir. 1975), cert. denied, 429 U.S. 821 (1976); NLRB v. Security Guard Service Co., 384 F.2d 143, 149-51 (5th Cir. 1967); Douds v. Seafarers' Int'l Union, 148 F. Supp. 953, 957 (E.D. N.Y. 1957); Graham Transportation Co., 124 NLRB 960, 962 (1959); Operating Engineers, Local 25, (Great Lakes Dredge & Dock Co.), 178 NLRB 292, 293, n. 1 (1969).

Cases holding that workers who are essentially engaged in regular production tasks will not be considered supervisors unless it is shown that they actually exercised § 2(11) authority on more than a merely sporadic basis include Illinois State Journal-Register v. NLRB, 412 F.2d 37, 44 (7th Cir. 1969); Security Guard, supra, 384 F.2d at 147-49; NLRB v. Cousins Associates, 283 F. 2d 242 (2nd Cir. 1960); NLRB v. Lindsay Newspapers, Inc., 315 F.2d 709, 712 (5th Cir. 1963); NLRB v. Stewart, 207 F.2d 8, 10 (5th Cir. 1963); NLRB v. Quincy Steel Casting Co., 200 F.2d 293, 295-96 (1st Cir. 1952).

Cases holding that statutory supervision necessarily contemplates that § 2(3) employees are, directly or indirectly, being managed include Mourning v. NLRB, 559 F.2d 768, 770 (D.C. Cir. 1977) (semble); Illinois State Journal-Register, supra; ILGWU v. NLRB, 339 F.2d 116 (2nd Cir. 1964).

nature of the authority exercised by Mourning over others did not amount to true § 2(11) authority, the instant Petition rests upon an invalid premise, and does not provide an appropriate occasion to explore the status of a worker who exercises § 2(11) authority only over other supervisors.

Likewise, Petitioner misconceives the import of Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941). Phelps Dodge found that the broad remedial purposes of a § 10 (c) of the Act militated in favor of permitting the Board to order the reinstatement of strikers who were no longer "employees" as defined in § 2(3). But this case does not involve a construction of § 10(c) or of the Board's remedial powers. As the Court of Appeals observed, A. 1, pp. 8-9,

> "No such policy reasons exist in the present case to overcome the usual presumption that the plain words of § 2 mean what they say.
>
> Indeed, the policies underlying the Act militate in favor of applying the definition of § 2(3) in the present case." 9/

9/ For example, the Court of Appeals noted, the basic purpose of the statutory exclusion of supervision reflects the Congressional recognition that supervisors and employees have conflicting interests in labor relations matters. Here, however, Mourning and the other business fleet pilots were equals, each one of whom had an identical relationship to management and to each other. Id.

The Board itself had already read the Act and its policies this way (A. 3, p. 9); hence Petitioner errs, both in accusing the Court of Appeals of preempting the Board's policymaking province (Pet. 15), and in suggesting that the policy considerations outlined in Yeshiva are at odds with anything herein. The fact that "an entire faculty could be exempt from the Act's coverage as managerial employees" (Pet. 16) is hardly suggestive that an entire business entity could be excluded as consisting wholly of supervisors. As already shown, supra, p. 13, n. 6, managerial employees need never deal with employees in order to be invested with an employer's outlook and responsibilities on labor relations matters; supervisors, by virtue of express statutory language and common sense, need employees to supervise. Petitioner cites no Court of Appeals decision which suggests otherwise.

2. The Court of Appeals' decision that Mourning was discharged for an unlawful purpose is in conflict with no other decision.

In an effort to find an issue worthy of certiorari in this discriminatory discharge case, Petitioner plainly overreaches. According to Petitioner, the Board and the Court were not permitted to conclude that the

Company's motivation for Mourning's discharge was the forbidden one because Heimerdinger, the Company's key witness, expressly testified that he had other purposes in mind and the Board never made an explicit adverse credibility resolution. Pet. 21-28.

As we have already indicated, however, the circumstantial evidence in this case was compelling (supra, pp. 2, 9, 11), and even another Company official agreed that Mourning seemed to be the victim of anti-union animus (supra, p. 9, n. 5). It is clear beyond cavil that the Board implicitly rejected Heimerdinger's self-serving testimony, and that there was ample evidentiary support for that result. Petitioner cites no authority for the proposition that the Board must always make an explicit credibility resolution; indeed, the law is well settled to the contrary. NLRB v. Walton Manufacturing Co., 369 U.S. 404 (1962); Universal Camera Corp. v. NLRB, 340 U.S. 474, 493-496 (1951).[10/]

10/ Accord: NLRB v. Warren L. Rose Castings, Inc., 587 F.2d 1005, 1008 (9th Cir. 1978); NLRB v. Cooke & Jones, Inc., 339 F.2d 580, 581 (1st Cir. 1964) (per curiam); NLRB v. Jackson Maintenance Corp., 283 F.2d 569, 570 (2nd Cir. 1960) (". . . the record on review may well create doubts with respect to the truthfulness of a witness so powerful that they outweigh any evaluation based upon demeanor.")

In any event, Petitioner is hardly entitled to complain here about the fact that the Board did not remand to the ALJ for express credibility findings since, as the Court of Appeals pointed out, A. 1, p. 12, the Company never clearly asked the Board to do that.

3. The Court of Appeals' decision does not decide an important question of federal law which should be settled by this Court.

Contrary to Petitioner's suggestion, Pet. 6-7, 17, this case does not involve any determinations which are "central to the structure of the Nation's labor laws and the organization of its industrial enterprises"; nor has anyone "ignored an age old body of law on the . . . rights of a ship's captain . . ." In fact, the Court of Appeals' decision here breaks no important new ground.

Although Petitioner argues (Pet. 15) that Congress intended to exclude from the Act's protection all persons "who supervised others", lest even vice-presidents be unionized, the decisions of the Board and the Court of Appeals augur no change in settled doctrine. The instant decisions expressly preserve the notion that a person with true supervisory authority remains a

supervisor even if he deals with employees only indirectly, through a chain of command (A. 1, p. 8, n. 1). But Mourning's authority was quite different: it was not only routine safety authority but, in addition, its exercise was confined to, and exhausted within, a small group of his own peers.

In such a situation, where the disputed authority is thus shared, alternated and confined, it is rarely claimed that such authority is truly supervisory. Hence, if the Board's present gloss on the law of § 2(11) has any new impact at all, it will be felt only in those cases where, as here, supervisory authority was unlikely to be found in any event. In the past, in analogous situations, the Board and the Courts have always been reluctant to attribute supervisory status to the employee who is "in charge of" only a few other employees, where the others perform the same kind of work, and where the function of taking charge shifts according to some internal rotation scheme. Global Marine, supra, 528 F.2d at 94; NLRB v. Parma Water Lifter Co., 211 F. 2d 258, 261 (9th Cir. 1954), cert. denied, 348 U.S. 829; Food Employees Union, Local 347 v. NLRB, 422 F.2d 685 690 (D.C. Cir. 1969); NLRB v. Lindsay Newspapers, Inc.,

315 F.2d 709 (5th Cir. 1963); NLRB v. Quincy Steel Casting Co., 200 F.2d 293 (1st Cir. 1952). Hence no novel or important questions are raised merely because the "direction" performed in such a limited and fluctuating context was, on the particular facts of this case, deemed non-supervisory.

As for the law of ships' captains, Petitioner errs in claiming that the captain of a vessel has always been deemed a supervisor (Pet. 17). In this respect, Petitioner only echoes the erroneous view of the ALJ, which the Board properly corrected after remand. It is settled law that determination of a supervisory status vel non turns upon a close examination of what the worker in question actually does, and not upon his job title.[11/] Accordingly, the Board has, with judicial approval, customarily refused to endow marine officers

11/ Yeshiva University, supra, — U.S. at —, 100 S. Ct. at 867 (The Board's decision must be based upon "examination of the facts of each case" rather than "on the basis of conclusory rationales"); Int'l Union of Electrical Workers v. NLRB (Tiidee Products), 426 F.2d 1243, 1247 (D.C. Cir. 1970), cert. denied, 400 U.S. 950; Arizona Public Service Co. v. NLRB, 453 F.2d 228, 230 (9th Cir. 1971); NLRB v. Sayers Printing Co., 453 F.2d 810, 815 (8th Cir. 1971); NLRB v. Metropolitan Life Ins. Co., 405 F.2d 1169, 1172 (2nd Cir. 1968); NLRB v. Griggs Equipment Co., 307 F.2d 275, 279 (5th Cir. 1962); NLRB v. Southern Bleaching and Print Works, 257 F.2d 235, 239 (4th Cir. 1958), cert. denied, 359 U.S. 911.

with supervisory status merely because they possess a license, the title of "captain", or are said to be "in charge of" a vessel. National Maritime Union (Standard Oil Co.), 121 NLRB 208 (1958), enf'd sub nom. National Marine Engineers v. NLRB, 274 F.2d 167 (2nd Cir. 1960); Southern Illinois Sand, 137 NLRB 1490 (1962); cases cited supra, p. 15, n. 8. The question remains, in each case, whether the disputed individual actually performs the kind of responsible direction described in § 2(11).

Hence, the Board's present refusal to treat its 1973 trilogy as establishing a broad conclusionary rationale, and its attendant determination to decide each airplane pilot case according to its own facts, has a firm basis in precedent and poses no issue warranting review. Indeed, the decision below is a plain example of the large class of cases which this Court has characterized as requiring "of necessity a large measure of informed discretion . . . by the Board . . . ." Marine Engineers v. Interlake Steamship Co., 370 U.S. 173, 179, n. 6 (1962).

CONCLUSION

The Court of Appeals' decision is fully consonant with the law established by this Court. Moreover, it presents no conflict with any other Court of Appeals decision and is correct as a matter of fact and law. Accordingly, the petition for a writ of certiorari should in all respects be denied.

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No. 81-1262
IN THE

Supreme Court of the United States

October Term, 1981

MCDONNELL DOUGLAS CORPORATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

ROBERT H. MOURNING,

Intervenor.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF OF PETITIONER.

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REPLY BRIEF OF PETITIONER.

Introduction.

What is not said in a brief is frequently more important and more revealing than what is said. Just such is the case here. In its petition Petitioner McDonnell Douglas Corporation ("MDC") establishes that the decisions of the National Labor Relations Board (The "Board") and the Court of Appeals for the Ninth Circuit were, *inter alia*, inconsistent with the legislative history of the Taft-Hartley Act. The petition further established that the Ninth Circuit could not, and as it purported to do, enforce the Board's decision based on substantial evidence in the record as a whole for the Board did not purport to base its decision upon the record as a whole. Rather, the Board attempted, totally improperly, to decide this case on the "uncontradicted" evidence al-

though the evidence on the crucial issue of motivation and many other issues was totally contradicted.

The opposition briefs of the Board and Intervenor have done little to rebut MDC's arguments in this regard. Instead they have urged this Court to deny certiorari based on grounds other than those relied upon by the Board or upon alternative holdings which are both factually and legally improper.

ARGUMENT.

1. The Response of the National Labor Relations Board Does Not Deny That the Decisions of the Board and the Ninth Circuit Are Inconsistent With the Legislative History of the Taft-Hartley Act. Instead, the Board Seeks Primarily to Rely Upon a Totally Unsupportable Alternative Holding.

Both the Board and the Ninth Circuit have held in this matter that an employee may not be classified as a supervisor within the meaning of Section 2(11) of the National Labor Relations Act, as amended (the "Act"), if the employee supervises directly or indirectly only other supervisory employees. In its petition, the McDonnell Douglas Corporation demonstrated that this holding was totally inconsistent with the legislative history of the Taft-Hartley Act, a history which has been specifically recognized by the decisions of this Court in *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974) and *NLRB v. Hendricks County Rural Electric Membership Corp.*, ... U.S. ...., 50 U.S. Law Week 4037 (December 2, 1981). In response neither the Board nor the Intervenor has denied that the decisions in this matter are inconsistent with the legislative history of the Taft-Hartley Act. Instead, the Board's response places its reliance primarily upon the alternative holding by the Board that any exercise of supervisory authority by Mourning was too spo-

radic to support a finding that he was a supervisor under the Act because Mourning testified he flew with a co-pilot only 5 percent of the time. (Board Response, pp. 7-8; A3- pp. 3-4; Tr. 59). But this alternative holding is so seriously flawed that it cannot obviate the need to examine and resolve the conflict between the interpretation of the Act by the Board and the Ninth Circuit, on the one hand, and that which is mandated by the legislative history of the Act, on the other.

In the first place, reliance cannot be placed upon the alternative holding with regard to the supervisory issue because this alternative holding is inconsistent with the controlling remand from the Court of Appeals for the District of Columbia. This remand limited the issues before the Board to whether supervisor authority over co-pilots was sufficient supervisory authority under the Act, in which event Mourning was to be excluded as a supervisor or, if not, whether he ever supervised in a sufficiently meaningful way any employees other than his co-pilots. 559 F.2d at 771. Thus, as discussed in the petition (p. 18) the D.C. Circuit recognized that if supervisory authority over a co-pilot was indeed supervisory authority as defined by the Act, Mourning must under the facts here be so classified. The Board's response and that of Intervenor simply ignore this limitation, as did the Board and the Ninth Circuit, thus leaving this Court as the only source of potential relief from the conflict between the D.C. Circuit and the Ninth Circuit.

In the second place, reliance cannot be placed upon the Board's alternative holding for additional reasons which are both legal and factual in nature. Thus, MDC's petition demonstrated that even if the 5 percent figure was accurate, Mourning must be recognized as a supervisor since it is the existence of supervisory power and not the frequency of its exercise which is determinative of a supervisory status.

(Petition, p. 20). In response, the Board argues that the cases relied upon by Petitioner can be distinguished because they are said to deal with the situation where an individual regularly occupies a supervisory position but only exercises such authority on an occasional or infrequent basis. Here, the Board contends, there is involved only an individual who occasionally occupies the position which entitles him to exercise supervisory authority. (Board Response, p. 10). However, since Mourning regularly occupied his pilot's position which permitted him to exercise his supervisory authority, the distinction relied upon by the Board simply does not exist. Thus, the conflict between the Circuits noted in the Petition remains.

But even if the distinction relied upon by the Board was legally appropriate, the alternative holding of the Board and the Ninth Circuit could not stand for the undisputed facts establish that in the months immediately prior to his discharge — the legally relevant time period for determining Mourning's status — Mourning flew with a co-pilot approximately 30 percent of the time. In response, the Board does not dispute petitioner's authorities establishing that the lawfulness of an employee's discharge is to be determined by his status at the time of his discharge. (Petition, p. 19). Rather, the Board argues in a footnote that even if a Petitioner's estimate of 30 percent is accurate — and it could hardly be otherwise since it is based upon undisputed testimony in the record —

> "there is no showing that this increased amount of flying with a co-pilot represented a permanent change in the nature of Mourning's duties, rather than a short-term aberration designed to enable a newly-rated pilot to gain greater experience and proficiency with the plane." (Board Response, p. 8 n.4).

But in making this argument the Board is forgetting that its own Rules and Regulations squarely place the burden of proof for establishing an unfair labor practice upon the Board's General Counsel. 29 C.F.R. 101.10(b).[1] Also *cf. Texas Department of Community Affairs v. Burdine*, ... U.S. ...., 101 S.Ct. 1089, 1095 (1981) (plaintiff in a Title VII case "retains the burden of persuasion"). It is thus not open for the Board's General Counsel to speculate now that the 30% figure established by the record may only have been temporary, for there is no evidence in the record whatsoever that Mourning's increase in flying with a co-pilot after he became rated in the Jet Commander in August was temporary. Moreover, General Counsel's attempt to explain away the 30% figure must also be rejected for the Board made no finding that Mourning's assignments during the three months prior to his termination were only temporary and it is well established that Board decisions may not be supported by "substitut[ing] counsel's *post hoc* rationale for the reasoning supplied by the Board itself." *NLRB v. Yeshiva*, 444 U.S. 672, 100 S.Ct. 856, 864 n.22 (1980).

Thus, for each of the reasons set forth above, reliance cannot be placed upon the alternative holding of the Board and the Ninth Circuit. Accordingly, the Board's holding in this matter with regard to Mourning's not being a supervisor can be sustained, if at all, only if the Board has correctly interpreted the Taft-Hartley Act in holding that an employee who exercises supervisory authority only over other supervisors may not be classified as a supervisor under the Act. For the reasons set forth in our initial Petition, however, this holding cannot be sustained.

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[1] 29 C.F.R. 101.10(b) provides in pertinent part:
"The Board's attorney has the burden of proof of violations of Section 8 of the National Labor Relations Act. . . ."

2. The Response of the National Labor Relations Board Does Not Deny That Credibility Determinations Are Necessary to Resolve the Merits of the Underlying Unfair Labor Practice. Instead, the Board Contends That Such Resolutions Were Implicitly Made and That, in Any Event, Petitioner Is Precluded From Raising This Crucial Defect.

Even if pilot Mourning were not, however, held to be a supervisor, the decisions of the Board and the Ninth Circuit in this matter could not stand because of their improper approach to the merits of the underlying unfair labor practice. Again, the silence of the Board's response is most significant. Thus, although the Board stated that it could resolve the merits of the unfair labor practice allegations upon "uncontradicted testimony in the record" (A3-p. 10, n.20, 238 NLRB at 671 n.20) and the Ninth Circuit concluded that substantial evidence on the record as a whole supported the Board's findings (A1- p. 12, 655 F.2d at 938), the Board's brief in response does not attempt to defend either of these indefensible bases. Instead, the General Counsel again offers alternative reasons as to why the Board's decision should be enforced. Thus, General Counsel, like Intervenor, argues that the Board did in fact make the credibility findings necessary to resolve the disputed testimony. They were made, it is said, "implicitly." (Board Response, p. 13; Intervenor Response, p. 18). But counsels' argument that the Board implicitly made credibility findings — while recognizing the need for credibility findings in a case such as this where there is directly conflicting evidence with regard to the crucial issue of motivation and conflicting inferences to be drawn from the evidence — is in direct conflict with the Board's statement that it was basing its decision "on uncontradicted testimony in the record." (A3-p. 10 n.20; 230 NLRB at 671 n.20). Thus, for the reasons

noted in the Petition (pp. 21-28), the Board's decision cannot stand.

In a final effort, however, to avoid this necessary result, the Board argues that "since petitioner never raised this issue [the need for credibility resolutions] before the Board, it is precluded from doing so here." (Board Response, p. 13). In putting forth this alternative argument the Board totally misrepresents both the law and the record with regard to this matter.

To deal with this contention, it is necessary to put this matter in its procedural perspective. Before the Administrative Law Judge ("ALJ") MDC raised two issues: Mourning's supervisory status and MDC's proper motivation in terminating him. The ALJ determined that Mourning was indeed a supervisor and hence found it unnecessary to address the merits of the dispute. (A2- pp. 2-7). Exceptions were filed by the General Counsel and Intervenor to this finding of supervisory status and to the refusal to find an unfair labor practice on the merits. (R.I. 21 and R.I. 22). MDC filed a brief in which it supported the ALJ on the supervisory status and discussed, alternatively, the merits pointing out in a section denominated "Credibility":

> "1. In deciding the supervisory issue, inherent in which were serious credibility conflicts requiring resolution, it is obvious that the ALJ credited Company witnesses over Mourning and Campbell; and
>
> "2. Had the Judge specifically decided the remaining issues of the case, even greater credibility resolutions would have to be made." (R.I. 23, p. 26).

The Board, however, did not make further credibility resolutions but instead adopted the decision of the ALJ with regard to Mourning's supervisory status. A2- p. 1, 221 NLRB 1180 (1975). The case then went to the D.C. Circuit, which remanded the matter to the Board with regard to the

supervisory issue only. 559 F.2d 768. In light of the limited remand, MDC's brief to the Board, like that of the Board's General Counsel, was confined to the supervisory issue (R.I 25 and R.I. 26), obviously in the belief that if the Board decided the supervisory issue adversely to MDC's position, the Board would then pick up the merits as they had previously been briefed. This likewise was the understanding of Counsel for the General Counsel for after arguing for reversal with regard to the supervisory issue, Counsel for the General Counsel concluded in his brief to the Board upon the remand:

> "For the foregoing reasons, Counsel for the General Counsel requests the Board to remand the instant matter to the Administrative Law Judge for a Supplemental Decision based on the entire record, without further hearing, which Supplemental Decision should incorporate his findings, including credibility resolutions, and his conclusions on the substantive matters at issue." (R.I. 26, p. 6).

Based upon these undisputed facts it is obvious, for at least three independent reasons, that there is no merit whatsoever to the Board's contention that MDC has been precluded from challenging the failure of the Board to make the credibility determinations necessary to resolve the merits of the unfair labor practice allegations in this matter. *First*, the need for further credibility resolutions if the merits of the unfair labor practice were to be addressed was explicitly raised to the Board by MDC the only time it was appropriate for it to do so. (R.I. 23). This request was never withdrawn nor waived by MDC. *Second*, it is ridiculous to suggest that the respondent in an administrative proceeding must explicitly remind the administrative agency at each step of the proceedings that the agency is obligated to follow its rules and regulations, its procedures and precedents, and to accord

the parties before it procedural due process such as by making the credibility resolutions necessary to resolve the contested issues before it. *Third*, Section 10(e) of the Act, upon which the Board relies,[2] is fully satisfied if *any* party has raised the objection before the Board. *Mourning v. NLRB*, 559 F.2d at 771 and 771 n.5.[3] Thus, even if petitioner had not specifically raised the need for greater credibility determinations if the merits were to be addressed (R.I. 23, p. 26), the request by the General Counsel for the remand to the ALJ for a supplemental decision would be sufficient to preserve this issue for review.

The issue of credibility was thus squarely before the Board and the procedural dictates of Section 10(e) have been more than fully complied with here.[4] The attempt by the Board and Intervenor to foreclose consideration of the important procedural irregularities here must therefore be rejected.

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[2]Section 10(e) provides in pertinent part:

> "No objection that has not been urged before the Board, its members, agent, or agency, shall be considered by the court unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

[3]It is particularly important to apply this rule to a fact situation such as that here for until it did so in the Ninth Circuit MDC never was in a position to file objections to the Board's failure to make credibility findings. This is so because the failure did not occur until the Board's final decision in 1978. Indeed, MDC had *prevailed* before the ALJ and the Board up to that point. Thus, as soon as MDC had the opportunity to do so, it did attack the Board's failure to resolve the conflicts in the testimony by purporting instead to decide the case on the basis of "uncontradicted testimony." MDC was not, of course, required to ask the Board to reconsider its decision before proceeding to the Ninth Circuit. 29 C.F.R. §102.48(d)(3).

[4]*NLRB v. Ochoa Fertilizer Corp.*, 368 U.S. 318, 322 (1961) relied upon by the Board is simply not applicable for it deals with facts totally unlike those here.

Conclusion.

For each of the foregoing reasons, as well as the reasons set forth in the initial Petition, Petitioner prays this Court to grant its Petition for a writ of certiorari.

Dated: March 8, 1982.

Respectfully submitted,

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